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A CENTURY OF JUDICIAL HISTORY

Chief Justice Lenore L. Prather[*]

The judicial branch of government in Mississippi has seen significant change over the past 100 years. Although the span of 100 years appears rather inconsequential as we enter a new millennium, those years comprise the greater part of the history of the judicial branch. Mississippi's court system was initially established when its first constitution was drafted in 1817.[1] During the next seventy-three years, Mississippi's constitution underwent three revisions.[2] Each constitution made changes in the court system. As a result, the focus of the history of the judicial branch is on its formation during the period from 1817 until 1890 when Mississippi's final constitution was drafted. During the past 100 years, the court system has been operating under the Constitution of 1890. These years have been ones of fine-tuning the structure that was put into place by the 1890 constitution and of expanding the role and size of the judiciary. This article does not attempt to document every step in the process that led to enactment of the laws, which have made the judicial branch what it is today because many of those have been discussed in articles elsewhere. Rather, this is a broad overview of the progress that was made in the twentieth century.

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[*] Chief Justice Prather began practicing law with her father in West Point, Mississippi and following the death of her father, she practiced law with husband, Robert Brooks Prather. For her first judicial experience, she served as a municipal judge for six years and subsequently as chancery judge for eleven years where the largest part of her work was in the family law and equity jurisdiction. With that judicial experience, she was appointed to the Mississippi Supreme Court, where she has served for eighteen years, ultimately becoming Chief Justice. Although dealing with all areas of the law, she is fortunate to have had some input into development of the law of equitable distribution of marital assets and sixteenth section land management law.

Mary E. Miller, Director of the Mississippi College Law Library, assisted with the research for this article.

[1] MISS. CONST. of 1817.

[2] MISS. CONST. of 1832; MISS. CONST. of 1869; MISS. CONST. of 1890.

I. ENLARGEMENT OF THE TRIAL COURTS

The Constitution of 1890 gave the Legislature the power to "divide the state into convenient circuit and chancery court districts."[3] The governor was given the power to appoint judges of the circuit and chancery courts, who would serve four-year terms.[4] In 1900, Mississippi was divided into seven chancery court districts[5] with seven chancellors[6] and ten circuit court districts[7] with ten judges.[8] The chancery court districts were:

First District: Alcorn, Chickasaw, Clay, Itawamba, Lee, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, Union, and Webster.[9]

Second District: Clarke, Covington, Greene, Hancock, Harrison, Jackson, Jasper, Jones, Lauderdale, Marion, Newton, Pearl River, Perry, Smith, and Wayne.[10]

Third District: Benton, Calhoun, DeSoto, Grenada, LaFayette, Marshall, Montgomery, Panola, Tate, Tippah, and Yalobusha.[11]

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[3] MISS. CONST. art. 6, § 152, *amended by* H.R. Con. Res. 23, 1981 Leg., Reg. Sess., 1981 Miss. Laws 1829, *amended by* S. Con. Res. 526, 1992 Leg., Reg. Sess., 1992 Miss. Laws 1324.

[4] MISS. CONST. art. 6, § 153, *amended by* S. Con. Res. 17, 1912 Leg., Reg. Sess., 1912 Miss. Laws 449.

[5] MISS. CODE OF 1892, ch. 20, § 440.

[6] *Id.* § 456.

[7] MISS. CODE OF 1892, ch. 21, § 609, *amended by* Act of Mar. 11, 1896, ch. 72, 1896 Miss. Laws.

[8] MISS. CODE OF 1892, ch. 21, § 631.

[9] *Id.* § 441.

[10] *Id.* § 442.

[11] *Id.* § 443.

Fourth District: Adams, Amite, Claiborne, Franklin, Jefferson, Sharkey, Warren, and Wilkinson.[12]

Fifth District: Copiah, Hinds, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, and Yazoo.[13]

Sixth District: Attala, Carroll, Choctaw, Holmes, Kemper, Leake, Lowndes, Neshoba, Noxubee, Scott, and Winston.[14]

Seventh District: Bolivar, Coahoma, Issaquena, Leflore, Quitman, Tallahatchie, Tunica, Sunflower, and Washington.[15]

The circuit court districts were:

First District: Alcorn, Chickasaw, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, and Tishomingo.[16]

Second District: Clarke, Greene, Hancock, Harrison, Jackson, Marion, Pearl River, Wayne, and Jasper.[17]

Third District: Benton, DeSoto, Lafayette, Marshall, Panola, Tate, Tippah, Union, and Yalobusha.[18]

Fourth District: Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, Tunica, and Washington.[19]

Fifth District: Attala, Calhoun, Choctaw, Clay, Carroll, Grenada, Holmes, Montgomery, and Webster.[20]

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[12] *Id.* § 444.

[13] *Id.* § 445.

[14] *Id.* § 446.

[15] *Id.* § 447.

[16] *Id.* § 610.

[17] Act of Mar. 11, 1896, ch. 72, § 3, 1896 Miss. Laws 82, 83.

[18] MISS. CODE of 1892, ch. 21, § 612.

[19] *Id.* § 613.

[20] *Id.* § 614.

Sixth District: Adams, Amite, Franklin, Jefferson, Lawrence, Pike, and Wilkinson.[21]

Seventh District: Copiah, Hinds, Lincoln, Madison, and Yazoo.[22]

Eighth District: Covington, Jones, Leake, Newton, Perry, Rankin, Scott, Simpson, and Smith.[23]

Ninth District: Claiborne, Issaquena, Sharkey, and Warren.[24]

Tenth District: Noxubee, Winston, Neshoba, Kemper, and Lauderdale.[25]

In 1904, the Legislature enacted legislation, which added an eighth chancery district[26] and an eleventh circuit district.[27] In 1906, the Legislature created a twelfth[28] and a thirteenth circuit court district.[29] During this time period, two new counties were created, which were added to the chancery and circuit court districts.[30]

In addition to creating new court districts, the Legislature was also interested in changing the method of selecting judges from appointive to elective. In 1910, the Legislature adopted a concurrent resolution proposing to amend the constitution to provide that judges of the circuit and chancery courts be elected rather than appointed.[31] In 1912, the Legislature passed a resolution to insert the amendment to elect judges into the constitution after a majority of voters approved the amendment in an election held on November 8, 1910,[32] and it also requested the supreme court to render an opinion as to whether the constitutional amendment providing for elective judges was properly submitted and adopted.[33] The constitutionality of the amendment was at issue in a 1914 case, *State* ex rel. *Collins v. Jones*, which involved a chancellor who had been appointed by the governor in 1913 following adoption of the amendment.[34] The court held that the amendment had been properly submitted and received the requisite number of votes.[35] The year 1910 not only saw the method for selecting judges changed but also saw the creation of the ninth and tenth chancery districts.[36] Also that same year four additional circuit court districts were created bringing the total number of circuit court districts to seventeen.[37] By the time the Legislature met again two years later, some members evidently felt that it had created too many court districts. In 1912, the Legislature passed two resolutions to appoint a committee consisting of seven members of the House and five senators to investigate how many circuit and chancery court districts could be eliminated.[38] No action was taken by the Legislature with regard to the districts in the years from 1912 to 1924, and in 1924, the Legislature again passed a resolution to appoint a committee of seventeen from the House and seventeen from the Senate, reflecting the number of circuit court districts, to draft a bill to reduce the number of circuit and chancery districts.[39] The charge of the committee was to reduce the circuit court districts to a number less than seventeen but not less than thirteen and the chancery court districts to not less than nine.[40]

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[21] *Id.* § 615.

[22] *Id.* § 616.

[23] Act of Mar. 11, 1896, ch. 72, § 3, 1896 Miss. Laws 82, 83.

[24] MISS. CODE OF 1892, ch. 21, § 618.

[25] Act of Mar. 11, 1896, ch. 72, § 1, 1896 Miss. Laws 82, 82-83.

[26] Act of Mar. 19, 1904, ch. 82, § 2, 1904 Miss. Laws 102, 103.

[27] Act of Mar. 22, 1904, ch. 83, 1904 Miss. Laws 108.

[28] Act of Feb. 5, 1906, ch. 106, 1906 Miss. Laws 92.

[29] Act of Apr. 10, 1906, ch. 105, 1906 Miss. Laws 89.

[30] The county of Jefferson Davis was added to the fifth chancery district and the thirteenth circuit district. Act of Feb. 14, 1908, ch. 213, § 2, 1908 Miss. Laws ch. 215, 216. The county of Walthall was created, Act of Mar. 2, 1912, ch. 360, § 1, 1912 Miss. Laws 415, 415, and added to the fourth chancery court district and the fourteenth circuit court district. Act of Mar. 25, 1914, ch. 439, § 6, 1914 Miss. Laws 483, 483.

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[31] H.R. Con. Res. 19, 1910 Leg., Reg. Sess., 1910 Miss. Laws 306.

[32] S. Con. Res. 17, 1912 Leg., Reg. Sess., 1912 Miss. Laws 449.

[33] S. Con. Res. 44, 1912 Leg., Reg. Sess., 1912 Miss. Laws 467.

[34] 64 So. 241, 242 (Miss. 1914).

[35] *Collins*, 64 So. at 254-55.

[36] Act of Mar. 25, 1910, ch. 104, 1910 Miss. Laws 78.

[37] Act of Apr. 5, 1910, ch. 105, 1910 Miss. Laws 83.

[38] H.R. Con. Res. 31, 1912 Leg., Reg. Sess., 1912 Miss. Laws 458; H.R. Con. Res. 58, 1912 Leg., Reg. Sess., 1912 Miss. Laws 460.

[39] H.R. Con. Res. 4, 1924 Leg., Reg. Sess., 1924 Miss. Laws 608.

The court districts were never reduced in number, and in 1930, an eleventh chancery court district was created.[41] However, the Legislature continued to be concerned about the number of circuit court districts, and in 1932, it again provided for a committee to study the redistricting of circuit court districts with a view to reducing the number.[42] Although the number of districts was never reduced, no new circuit court districts were created until 1954.

The Legislature did continue to create chancery court districts, however. In 1947, the twelfth and thirteenth chancery court districts were created,[43] and in 1948, a fourteenth chancery district was created.[44] The fifteenth chancery district was created in 1950[45] and the sixteenth chancery court district in 1952.[46]

In 1954, the Legislature created the eighteenth circuit court district, the first circuit court district to be created since 1910.[47] That same year the seventh circuit court district received an additional judge in order to help relieve the crowded docket.[48] This was the first time the Legislature had allotted more than one judge per district. A new chancery court district, the seventeenth, was also created in 1954.[49] In 1955, the fifth chancery court district became the first chancery district to receive an additional chancellor.[50] Again, the chancellorship was created to help with the district's crowded docket. An eighteenth chancery court district was created in 1958.[51]

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[40] Act of Apr. 10, 1924, ch. 150, 1924 Miss. Laws 197.

[41] Act of May 17, 1930, ch. 113, 1930 Miss. Laws 290.

[42] S. Con., Res. 8, 1932 Leg., Reg. Sess., 1932 Miss. Laws 698.

[43] H.R. Con. Res. 4, 1947 Leg., Ex. Sess., 1948 Miss. Laws 935.

[44] Act of Apr. 14, 1908, ch. 239, 1948 Miss. Laws 213. Ironically, my father, Byron H. Loving, Senator of West Point, Mississippi, was the author of the bill creating the new fourteenth chancery district. Little did he know that several decades later his daughter would have the position of chancellor of one post in the fourteenth district. *See* S.B. 648, An Act to Create Fourteenth Chancery District (Introduced by Senator Loving), 1948 MISS. S.J. 464.

[45] Act of Mar. 21, 1950, ch. 315, 1950 Miss. Laws 349.

[46] Act of Apr. 16, 1952, ch. 232, 1952 Miss. Laws 259.

[47] Act of May 4, 1954, ch. 254, 1954 Miss. Laws 278.

[48] Act of Sept. 28, 1954, Ex. Sess., ch. 17, 1954 Miss. Laws 19.

[49] Act of Sept. 21, 1954, Ex. Sess., ch. 18, 1954 Miss. Laws 21.

The Legislature created the nineteenth circuit court district in 1962[52] and the nineteenth chancery court district in 1966.[53] The twentieth circuit court district was created in 1971[54] and the twentieth chancery court district in 1977.[55]

In 1981, the age-old concern regarding the number of court districts was again given voice. The Legislature adopted a concurrent resolution that provided for an amendment to section 152 of the constitution, which, since 1890, had allowed the Legislature to divide the state into convenient court districts. The amendment to the section would require that the Legislature divide the state into not more than twenty circuit and twenty chancery court districts, establish criteria to determine the number of judges in each district, and redistrict the court districts following each federal decennial census. The amendment was to be submitted to the voters in November 1982.[56] The voters approved the amendment, and it was inserted into the constitution in 1983. In 1984, the Legislature established specific criteria to be used in determining the number of judges in each court district. The criteria included the population of the district, the number of cases filed, the caseload of each judge, the geographic area of the district, the needs of the district as analyzed by court personnel, and any other appropriate criteria.[57]

In addition to state measures designed to equalize court districts, the federal courts have had an opportunity to become involved in the redistricting of circuit and chancery court districts. In 1987, in the case *Martin v. Allain*, a number of black voters in Mississippi brought an action in federal court, challenging the multi-member districts used to elect chancellors and circuit judges in chancery and circuit court districts.[58] After reviewing the evidence presented, the court determined that racial polarization of voters did exist throughout Mississippi.[59] The court held that the plaintiffs had established a violation of the Voting Rights Act in the fifth, seventh, ninth, and eleventh chancery court districts and the fourth, seventh, and eleventh circuit court districts because minorities have less opportunity in these districts "to participate in the political process and to elect representatives of their choice."[60] The parties were ordered to attend a conference regarding the alternatives available to remedy the problem.[61]

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[50] Act of Apr. 7, 1955, Ex. Sess., ch. 35, 1955 Miss. Laws 125.

[51] Act of Mar. 17, 1958, ch. 269, 1958 Miss. Laws 445.

[52] Act of Mar. 29, 1962, ch. 296, 1962 Miss. Laws 533.

[53] Act of Mar. 31, 1966, ch. 326, 1966 Miss. Laws 628.

[54] Act of Mar. 11, 1971, ch. 344, 1971 Miss. Laws 341.

[55] Act of Apr. 11, 1977, ch. 451, 1977 Miss. Laws 758.

[56] H.R. Con. Res. 23, 1981 Leg., Reg. Sess., 1981 Miss. Laws 1829. The amendment also provided that if the Legislature had failed to redistrict the courts by the fifth year following the census, the supreme court should redistrict the courts by court order. *Id.*

[57] Act of Apr. 26, 1984, ch. 443, 1984 Miss. Laws 229.

The court devised a solution to the problem in *Martin v. Mabus*.[62] The resulting court-approved plan provided that judges would be elected from single-member sub-districts although serving the district as a whole.[63] The court also considered various factors in drawing the plan for judicial redistricting. Some of the factors considered were that each district should have at least one sub-district with a black majority population of sixty percent, the single member sub-districts should be contiguous, whole counties should be preserved in multi-county districts, cities or towns should not be divided among sub-districts, sub-districts should be drawn along precinct lines if a county had to be divided, precincts should not be divided among sub-districts, common lines should be used for sub-district boundary lines if a county or city had to be divided, and the maximum range of deviation allowed for a population variance among sub-districts would be fifteen percent.[64] Using those guidelines, the court adopted new subdistricts for the fourth, seventh, and eleventh circuit court districts and the fifth, seventh, ninth, and eleventh chancery court districts.[65]

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[58] 658 F. Supp. 1183 (S.D. Miss. 1987).

[59] *Martin*, 658 F. Supp. at 1194.

[60] *Id.* at 1204.

[61] *Id.* at 1205.

[62] 700 F. Supp. 327 (S.D. Miss. 1988).

[63] *Mabus*, 700 F. Supp. at 332.

In 1992, less than ten years after the Legislature had amended section 152 of the constitution to limit the number of chancery and circuit court districts, the Legislature reversed itself and adopted a resolution removing the twenty-district limitation and requiring only that the state be divided into an appropriate number of districts.[66] The amendment was approved by the voters and inserted into the constitution that same year. With the prohibition on creating new districts removed from the constitution, the Legislature in 1994 created the twenty-first[67] and twenty-second circuit court districts.[68]

In 1900, there were seven chancery court districts and ten circuit court districts. One hundred years later, there are twenty chancery court districts and twenty-two circuit court districts. In 1900, each chancery and circuit court district had one judge. Today, fifteen of the twenty chancery districts have more than one chancellor. The total number of chancellors serving the state is forty five. Of the twenty-two circuit court districts, seventeen have more than one judge. The total number of circuit court judges is forty nine.

II. DEVELOPMENT OF THE APPELLATE COURTS

The Constitution of 1890 provided for a three-judge supreme court. The judges were to be appointed by the governor with the advice and consent of the Senate. The state was divided into three supreme court districts, and one judge was to be appointed from each.[69] The supreme court districts in 1900 were:

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[64] *Id.* at 334-35.

[65] *Id.* at 337-43.

[66] S. Con. Res. 526, 1992 Leg., Reg. Sess., 1992 Miss. Laws 1324.

[67] Act of Apr. 6, 1994, ch. 564, § 73, 1994 Miss. Laws 809, 829.

[68] *Id.* § 74, at 829.

[69] MISS. CONST. art. 6, § 145.

First District: Attala, Bolivar, Hinds, Holmes, Issaquena, Kemper, Lauderdale, Leake, Madison, Neshoba, Newton, Noxubee, Rankin, Scott, Sharkey, Sunflower, Warren, Washington, Winston, and Yazoo.[70]

Second District: Adams, Amite, Claiborne, Clarke, Copiah, Covington, Franklin, Greene, Hancock, Harrison, Jackson, Jasper, Jefferson, Jones, Lawrence, Lincoln, Marion, Pearl-River, Perry, Pike, Simpson, Smith, Wayne, and Wilkinson.[71]

Third District: Alcorn, Benton, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, DeSoto, Grenada, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Webster, and Yalobusha.[72]

An issue that received a great deal of attention in 1900 was the election of judges. The Legislature had, in 1898, adopted a resolution to be submitted to the voters in November 1899, which would amend the constitution to provide for elected rather than appointed judges for the supreme court and chancery and circuit courts.[73] Following approval by the voters, the Legislature, in 1900, adopted a resolution to insert the amendment into the constitution.[74] The Legislature also passed an act, which would provide for the time and manner of the elections.[75]

In the case *State* ex rel. *McClurg v. Powell*,[76] the supreme court was called upon to decide whether the constitutional amendment had been properly adopted. The court held because the amendment that was submitted to the voters in one election proposed to repeal sections 145, 149, 151, 152 and 153 of the constitution, which were four separate amendments dealing with different matters, the process violated section 273 of the constitution, which provides that an amendment cannot be adopted unless it receives a majority of votes, i.e., the amendments should have been submitted to the voters in separate elections.[77]

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[70] MISS. CODE OF 1892, ch. 135, § 4337.
[71] *Id.*
[72] *Id.*
[73] S. Con. Res., 1898 Leg., Reg. Sess., 1898 Miss. Laws 97.
[74] S. Con. Res., 1900 Leg., Reg. Sess., 1900 Miss. Laws 236.
[75] Act of Mar. 10, 1900, ch. 80, 1900 Miss. Laws 96.
[76] 27 So. 927 (Miss. 1900).

An issue of concern to members of the bar in the early 1900s was the number of judges on the supreme court. At a Bar Association meeting in June 1906, the Committee on Jurisprudence and Law Reform recommended that the number of supreme court judges be increased from three to five. The Committee on Judicial Administration and Remedial Procedure agreed that the number of judges needed to be increased but suggested that the Bar Association consider recommending that the number be increased to six and that the court sit in two divisions of three judges, one which would consider civil appeals and the other criminal appeals.[78] Following committee recommendations, the president of the Bar Association was required to approve a committee which would draft an amendment to the constitution to increase the supreme court to at least five judges and would also draft a proposed statute to create two supreme court commissioners to assist the judges: "The commissioners, it was considered, could take some of the load off of the shoulders of the justices of the highest court while the constitutional amendment to increase their number was going through the lengthy process of adoption."[79]

Evidently the lobbying efforts of the members of the Bar Association were successful. The Legislature in 1910 passed an act authorizing the governor to appoint two supreme court commissioners.[80] The commissioners were to "aid and assist the said court in the performance of its duties, and in the disposition of the causes now pending in the said court undetermined and in the determination of such causes as may be presented to the said court for determination."[81] The Act provided that the terms of the commissioners would be six and nine years but would expire when the number of supreme court judges was increased to five or more.[82] Following approval of the Act, Chief Justice A.H. Whitfield resigned from the court and was appointed to the nine-year term, and Frank A. McLain was appointed to the six-year term.[83] In 1912, the Legislature repealed the 1910 Act, which had created the supreme court commissioners[84]: "Repeal was accompanied by an attempt to create an intermediate 'Court of Appeals of Mississippi,' but that effort failed by a large margin, leaving the supreme court precisely where it had been in 1910."[85]

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[77] *Powell*, 27 So. at 935.

[78] MICHAEL DE L. LANDON, THE HONOR AND DIGNITY OF THE PROFESSION: A HISTORY OF THE MISSISSIPPI STATE BAR, 1906-1976 17 (1979).

[79] *Id.* at 18.

In 1914, the Legislature made another effort to provide for the election of supreme court judges. It passed resolutions to amend the constitution to provide for the election of judges[86] and to provide that the term of office for a supreme court judge would be eight years.[87] In addition, the Legislature adopted resolutions to increase the number of supreme court judges from three to six[88] and to allow the supreme court to sit in two divisions of three judges each in the event the amendment providing for six judges was approved.[89] All four amendments were approved by the voters, and the amendments were inserted into the constitution when the Legislature met in 1916.[90] The Legislature also enacted a law providing for the time and manner of elections.[91]

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[80] Act of Mar. 16, 1910, ch. 164, 1910 Miss. Laws 158.

[81] *Id.*

[82] *Id.*

[83] JOHN RAY SKATES, JR., A HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948 50 (1973).

[84] Act of Feb. 8, 1912, ch. 259, 1912 Miss. Laws 327.

[85] SKATES, *supra* note 83, at 50

[86] S. Con. Res. 29, 1914 Leg., Reg. Sess., 1914 Miss. Laws 522.

[87] S. Con. Res. 31, 1914 Leg., Reg. Sess., 1914 Miss. Laws 523.

[88] S. Con. Res. 28, 1914 Leg., Reg. Sess., 1914 Miss. Laws 525.

[89] S. Con. Res. 32, 1914 Leg., Reg. Sess., 1914 Miss. Laws 526.

[90] H.R. Con. Res. 19, 1916 Leg., Reg. Sess., 1916 Miss. Laws 208 (two divi-

The Bar Association continued to be concerned about the supreme court. In 1935, the members approved a report of one of its committees, which argued against creating another supreme court judgeship. That same year another committee proposed that the Bar support the adoption of a constitutional amendment, which would provide that supreme court judges, rather than being elected, be selected by the governor from a list of nominees submitted by the Bar. The proposal received a tie vote, and a decision was postponed until the next meeting.[92]

By 1950, the Legislature again felt the need to assist the supreme court with its workload. It passed an act allowing the Governor to appoint three supreme court commissioners, who would assist the court with the disposition of cases. The commissioners were to be appointed to four-year terms with the proviso that their terms would expire when the number of supreme court judges should be increased to nine or more.[93] The Legislature also passed a resolution to amend the constitution to increase the number of supreme court judges to nine.[94] Following approval by the voters of the constitutional amendment, the Legislature inserted the amendment into the constitution in 1952.[95] The Legislature also repealed the Act providing for the three supreme court commissioners that

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sions); H.R. Con. Res. 14, 1916 Leg., Reg. Sess., 1916 Miss. Laws 211 (six judges); H.R. Con. Res. 18, 1916 Leg., Reg. Sess., 1916 Miss. Laws 214 (election of judges); H.R. Con. Res. 17, 1916 Leg., Reg. Sess., 1916 Miss. Laws 216 (eight-year term of office).

[91] Act of Mar. 21, 1916, ch. 161, 1916 Miss. Laws 224.

[92] LANDON, *supra* note 78, at 107-08.

[93] Act of Mar. 21, 1950, ch. 317, 1950 Miss. Laws 352.

[94] S. Con. Res. 10, 1950 Leg., Reg. Sess., 1950 Miss. Laws 980. Again, it is ironic that my father, Senator Byron H. Loving, was author of the resolution adding three justices to the supreme court and that his daughter became a justice on the Mississippi Supreme Court many years later. *See* S. Con. Res. 10, 1950 Leg., Reg. Sess., A Concurrent Resolution Proposing an Amendment to the Constitution of the State of Mississippi Increasing the Number of Supreme Court Judges to Nine 1950 MISS. S.J. 125 (introduced by Senator Loving).

[95] S. Con. Res. 5, 1952 Leg., Reg. Sess., 1952 Miss. Laws 754.

same year.[96]

Beginning in the 1970s, the Legislature responded to the increased caseload of the supreme court by providing additional assistance. In 1973, the Legislature passed an act which allowed supreme court judges between the ages of sixty eight and seventy two to retire from active service on the court and to continue such service to the court as the court would designate. No more than three such judges could serve at any one time, no judge could serve longer than four years, and the judges were not allowed to vote on the decisions of the cases.[97]

In 1974, the nine-justice supreme court, "[i]n an effort to relieve the congestion and delay," decided that it would sit in three divisions of three justices each.[98] The constitutional section allowing the court to sit in two divisions of three judges had been added in 1916, when the court was increased from three to six judges.[99] The supreme court's decision to sit in three-judge divisions was challenged in *Russell v. State*.[100] Russell filed a motion challenging the court's order and requesting that his case be submitted to a quorum of the full court or to the court sitting en banc.[101] The court held that sections 145B, providing for nine supreme court justices, and 149A, providing that the supreme court can sit in two divisions of three justices each, were not in conflict. In overruling Russell's motion, the court stated:

> At the time of the adoption of section 149A the Court was increased to six judges. If the word "two" had been omitted there would have been no change in the meaning. The number of judges comprising a division was important; there could only be two divisions so the word "two" was surplusage. Of course, the Court, by administratively rotating the judges, could now sit in two divisions of three judges each, and thus

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[96] Act of Jan. 16, 1952, ch. 244, 1952 Miss. Laws 271.

[97] Act of Mar. 29, 1973, ch. 452, 1973 Miss. Laws 580.

[98] *Supreme Court To Use Three-Judge Panels*, MISS. LAW., Sept. 1974, at 1, 1.

[99] H.R. Con. Res. 19, 1916 Leg., Reg. Sess., 1916 Miss. Laws 208.

[100] 312 So. 2d 422 (Miss. 1975).

[101] *Russell*, 312 So. 2d at 422.

> follow the letter for section 149A. This would merely exalt form over substance. It is administratively more efficient to have three divisions instead of two, and substantively there is no difference between having two divisions and having three.[102]

The measures adopted by the Legislature and the supreme court were not enough, however, and in 1976, the Legislature provided the supreme court with the authority to request chancellors and circuit court judges to sit as a supreme court commissioner on a temporary basis. These temporary commissioners were to assist the court in the disposition of cases.[103]

In 1981, the supreme court was given the authority to request that a retired supreme court justice return to serve the court on an emergency basis. A justice who agreed to return would assist the court in the determination of cases but could not vote on the decisions.[104] The Legislature reenacted this act providing for the service of retired supreme court justices in 1984.[105]

The Legislature again gave the supreme court additional help in 1990. The Legislature passed an act giving the court authority to appoint three magistrates, one from each supreme court district. The magistrates were to serve at the will and pleasure of the court and to aid the court in the disposition of cases. By its own terms, the Act was repealed after December 31, 1995.[106]

Another development in 1990 was that a number of organizations and individuals including the Magnolia Bar Association filed suit in federal court alleging that the method of electing Mississippi supreme court justices violated section 2 of the Voting Rights Act.[107] The plaintiffs challenged certain features of supreme court elections including at-large, multimember, numbered posts and staggered terms because, the plaintiffs contended, they dilute black voting strength.[108] The plaintiffs also challenged the district lines dividing the three supreme court districts for the same reason.[109] The district court found that the plaintiffs failed to prove a violation of section 2 by a preponderance of the evidence and dismissed the case.[110] On appeal to the Court of Appeals for the Fifth Circuit, the decision of dismissal was affirmed.[111] The court held the district court could reasonably conclude that the election of two black supreme court justices from the central district was "probative evidence that whites would not vote as a bloc so as to usually defeat the preferred supreme court candidate of black voters."[112]

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[102] *Id.* at 424.
[103] Act of May 6, 1976, ch. 430, 1976 Miss. Laws 630.
[104] Act of Mar. 18, 1981, ch. 360, 1981 Miss. Laws 803.
[105] Act of Apr. 30, 1984, ch. 449, 1984 Miss. Laws 267.
[106] Act of Mar. 13, 1990, ch. 363, 1990 Miss. Laws 119.
[107] Magnolia Bar Ass'n, Inc. v. Lee, 793 F. Supp. 1386 (S.D. Miss. 1992).

Throughout the 1900s, the Legislature responded to the ever-increasing caseload of the supreme court by enacting temporary measures to deal with the problem except when it had increased the number of justices to six in 1914 and to nine in 1950. A court of appeals had been proposed and rejected in the Legislature in 1912.[113] However, the idea did not suffer a complete death. In 1970, the Mississippi Judiciary Commission reported to the Legislature that an intermediate appellate court would be necessary in the future.[114] In 1974, a law review comment suggested that the state needed a lower appellate system to reduce the workload of the supreme court.[115] In addition, "[c]omprehensive studies of the judiciary after 1985 led to recurring proposals for creation of an intermediate appeals court."[116]

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[108] *Magnolia Bar*, 793 F. Supp. at 1390.

[109] *Id.* at 1391.

[110] *Id.* at 1418.

[111] Magnolia Bar Ass'n, Inc. v. Lee, 994 F.2d 1143 (5th Cir. 1993).

[112] *Magnolia Bar*, 994 F.2d at 1149.

[113] *See* SKATES, *supra* note 83.

[114] Leslie H. Southwick, *The Mississippi Court of Appeals: History, Procedures, and First Year's Jurisprudence*, 65 MISS. L.J. 593, 607 (1996). This article details the history and creation of Mississippi's intermediate appellate court.

[115] David H. Baker, W. David Watkins, & Thomas Walter Tardy III, Comment, *Appellate Court Reform*, 45 MISS. L.J. 121 (1974).

[116] Southwick, *supra* note 114, at 609.

In July 1990, the president of the Mississippi Bar, Leonard A. Blackwell, created the Commission on the Courts in the Twenty-First Century, whose charge was to make recommendations for court reform that would carry Mississippi into the twenty-first century.[117] In studying the caseload of the supreme court, the Commission "found that Mississippi had the most people and one of the highest caseloads of any state with only a single appellate court."[118] Thus, the Commission concluded that Mississippi required an intermediate appellate court. The creation of an intermediate appellate court also received the support of Chief Justice Roy Noble Lee[119] and Chief Justice Armis E. Hawkins,[120] who replaced Chief Justice Lee when he retired in 1993.

The 1993 Legislature responded by passing an act, which established the court of appeals.[121] Among its various provisions, the Act provided that the court would be composed of five judges, the jurisdiction of the court would be those cases assigned to the court by the supreme court, the decisions of the court would be reviewable by the supreme court by writ of certiorari, and the court would be subject to administrative procedures established by the supreme court.[122] The Legislature expanded the number of judges on the court of appeals to ten in 1994.[123] The court of appeals has been in operation since January 1995.

III. ADMINISTRATIVE STRUCTURE OF THE COURTS

As the court system grew during the twentieth century, the Legislature saw a need to create a temporary commission to study the Mississippi judicial system and make recommendations for improvement of the system to the Legislature. To that end the Legislature in 1968 passed an act creating the Mississippi Judiciary Commission.[124] Specifically, the Commission was charged with studying:

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[117] S. Allan Alexander & Matthew Steffey, *Laying the Groundwork for Court Reform: A Report of the Mississippi Bar's Commission on Courts in the 21st Century*, 14 MISS. C. L. REV. 511, 517 (1994).

[118] *Id.* at 519.

[119] Chief Justice Roy Noble Lee, *State of the Judiciary Address*, MISS. LAW., Apr.-May 1992, at 10, 12.

[120] Southwick, *supra* note 114, at 616.

[121] Act of Apr. 15, 1993, ch. 518, 1993 Miss. Laws 654.

[122] *Id.*

[123] Act of Apr. 6, 1994, ch. 564, 1994 Miss. Laws 809.

> (a) Problems incident to the administration, structure and personnel of the courts;
>
> (b) Alleviation of calendar congestion and delays in bringing cases to trial;
>
> (c) Enlargement and location of rule-making power;
>
> (d) Improvement in the methods of selection of the judiciary;
>
> (e) Evaluation of the provisions of law pertaining to jury service, selection and qualification and exemptions therefrom;
>
> (f) The existing boundaries of chancery and circuit districts;
>
> (g) Changes in tenure of office and compensation of Judges of the supreme court, chancery judges, circuit judges, county judges and district attorneys;
>
> (h) Case loads of district attorneys;
>
> (i) Studies and recommendations as to the establishment of an adequate system of public defenders for the State of Mississippi;
>
> (j) Improvements in the system of county courts and justices of the peace;
>
> (k) Such other changes or revisions as will improve the efficiency and the quality of the judicial system, its personnel and the administration of civil and criminal justice in the

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[124] Act of July 31, 1968, ch. 312, 1968 Miss. Laws 427.

State of Mississippi.[125]

The Commission gathered statistics from all state courts, held twenty-one meetings and six public hearings, participated in six conferences, and reviewed reports from administrators and similar groups in other states.[126] The Commission made fifty-two recommendations, one of which was the creation of the Office of Administrator of the Courts.[127] The recommendation was made because the Commission determined "that *Mississippi courts do not operate their non-judicial, administrative business efficiently*."[128] The Commission found that courts throughout the state were not maintaining records uniformly and that no centralization existed among courts in each district.[129] In the supreme court, the Commission found that the chief justice was devoting between thirty-three and fifty percent of his time to administrative matters and that the presiding justice devoted between twenty-five and thirty-three percent of his time to these matters.[130]

The Commission felt that an Office of Administrator of the Courts would solve these problems. Having studied these offices as they existed in thirty-three other states, the Commission believed that creation of the office would correct the inadequacies in the judicial system. The Administrator would have limited powers and would be appointed by the supreme court to work under its supervision and control.[131] During the 1970 legislative session, the Legislature did consider a bill that would create the office as recommended by the Commission, but it died in a Senate committee.[132]

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[125] *Id.* § 3, at 429.

[126] Mary Libby Payne, *Mississippi Judiciary Commission—A Synopsis*, 41 MISS. L.J. 22, 22 (1969).

[127] *Id.* at 32.

[128] *Id.* at 23 (emphasis in original).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 24.

[132] Mary Libby Payne, *The Mississippi Judiciary Commission Revisited: Judicial Administration: An Idea Whose Time Has Come?*, 14 MISS. C. L. REV. 413, 420-21 (1994).

In 1977, the Legislature established another group to study the judicial system: the Judicial Council of the State of Mississippi.[133] The duties of the Council were

> (a) To make a continuing study of the administration of justice in this state and the methods of administration of each and all courts of the state, whether of record or not of record.
>
> (b) To receive reports of criticisms and suggestions pertaining to the administration of justice in this state.
>
> (c) To study judicial districting throughout the state and to make recommendations relating thereto.
>
> (d) To serve as an agency to apply for and receive any grants or other assistance and to coordinate and conduct studies and projects, with or without the assistance of consultants, in connection with the improvements of the administration of justice and trial courts in Mississippi.
>
> (e) To recommend to the supreme court and the Legislature such changes in the law or in the organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice as it may deem desirable.
>
> (f) To file an annual report with the supreme court, the Governor and the Legislature, with shall inform them of council deliberation and may contain recommendations for the improvement of the administration of justice, proposed legislation, or court rules to implement any or all recommendations. The council may submit interim reports, recommendations, proposed legislation or court rules to the supreme court at any time by a majority vote of the membership.
>
> (g) To collect, compile, analyze and publish statistical and other information concerning the work of the courts of this state and such other information as the council may prescribe

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[133] Act of Mar. 31, 1977, ch. 429, 1977 Miss. Laws 650.

> from time to time.
>
> (h) To employ an executive director and such other consultants, assistants and persons necessary for the operation of the council.[134]

The Act passed by the Legislature creating the Council included an automatic repeal provision. The Act was to be repealed from and after June 30, 1980.[135] Several bills were introduced in the 1980 legislative session to extend the life of the judicial council, but all failed.[136] During its three years of existence, the Council established the Mississippi Courts Information System to compile trial court statistical information, promoted a Commission on Judicial Performance, and sought changes in the bar admissions procedures.[137]

In 1978, the Legislature provided some administrative relief to the trial courts. It passed an act authorizing chancellors and circuit court judges to establish the Office of Court administrator in their counties either jointly or separately.[138] The duties of the court administrator were to include performing nonjudicial tasks of the court, maintaining statistical reports, coordinating the duties of clerks in the district, and providing general administrative support for the judges.[139]

In 1989, the Legislature effected an administrative merger of the supreme court, the Supreme Court Clerk's Office, and the State Law Library.[140] The library was placed under the supervision and control of the supreme court, which was given the power to promulgate policies and procedures for the operation of the library.[141] In 1991, the Legislature gave the supreme court the power to adopt regulations for reimbursement of the office operating allowances and travel expenses of chancellors and circuit judges and to prepare the payroll for the trial judges.[142] That year money was included in the supreme court's appropriation bill for expenses of special judges, chancellors, and circuit judges.[143]

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[134] *Id.* § 3, at 651.

[135] *Id.* § 6, at 653.

[136] Payne, *supra* note 132, at 427 n.70.

[137] *Id.* at 426.

[138] Act of Apr. 21, 1978, ch. 531, 1978 Miss. Laws 1115.

[139] *Id.* § 3, at 1116.

[140] Act of Apr. 4, 1989, ch. 101, 1989 Miss. Laws 116. The budgets of the three entities were combined and appropriated as a single budget. *Id.* § 3, at 116.

[141] Act of Mar. 6, 1989, ch. 321, 1989 Miss. Laws 31.

The Commission on the Courts in the Twenty-First Century, which was created by the President of the Mississippi Bar in 1990 to make recommendations on court reform, studied the Mississippi court system from the Commission's inception in 1990 until summer 1992.[144] The Commission identified many of the same problems in the system as the Mississippi Judiciary Commission had twenty years earlier.

The Commission was asked by the officers of the Bar Association to draft legislation to be introduced in the 1993 legislative session.[145] One of the areas the Commission identified as requiring immediate attention was the creation of an Administrative Office of Courts.[146] The Commission found that the court system "is organized in a way that mirrors the system in place one hundred years ago" and that "[e]ach court has operated independently of all others, enjoying near-feudal autonomy."[147] The Commission felt that a central administrative unit would result in a better coordination of courts and, as had been recommended by the Mississippi Judiciary Commission, the Commission suggested that the administrative office be placed under the supervision and control of the supreme court. The Commission also recommended that a Judicial Study Committee be established.[148]

The Legislature responded to the appeals of the bench and bar and created the Administrative Office of Courts in

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[142] Act of Mar. 15, 1991, ch. 373, 1991 Miss. Laws 213.

[143] Act of Apr. 5, 1991, ch. 70, § 5, 1991 Miss. Laws 104, 105.

[144] Alexander, *supra* note 117, at 517.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 518.

[148] *Id.* at 518-19.

1993.[149] The duties of the Office are

> (1) To require the filing of reports, the collection and compilation of statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts;
>
> (2) To determine the state of the dockets and evaluate the practices and procedures of the courts and make recommendations concerning the number of judges and other personnel required for the efficient administration of justice;
>
> (3) To prescribe uniform administrative and business methods, systems, forms and records to be used in the offices of the clerks of courts;
>
> (4) To prepare and submit budget recommendations for state appropriations necessary for the maintenance and operation of the judicial system and to authorize expenditures from funds appropriated for these purposes as permitted or authorized by law;
>
> (5) To develop and implement personnel policies for nonjudicial personnel employed by the courts;
>
> (6) To investigate, make recommendations concerning and assist in the securing of adequate physical accommodations for the judicial system;
>
> (7) To procure, distribute, exchange, transfer and assign such equipment, books, forms and supplies as are acquired with state funds or grant funds or otherwise for the judicial system;
>
> (8) To make recommendations for the improvement of the operations of the judicial system;
>
> (9) To prepare and submit an annual report on the work of

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[149] Act of Apr. 15, 1993, ch. 610, 1993 Miss. Laws 1119.

> the judicial system to the supreme court;
>
> (10) To take necessary steps in the collection of unpaid court costs, fines and forfeitures; and
>
> (11) To perform such additional administrative duties relating to the improvement of the administration of justice as may be assigned by the supreme court.[150]

The Legislature also established the Mississippi Judicial Advisory Study Committee, which would serve the Administrative Office of Courts by making recommendations regarding the administration of Mississippi courts.[151]

IV. JUDICIAL EDUCATION

Noah S. Sweat, Jr., a county attorney, district attorney, and circuit judge from Alcorn County and a professor of law at the University of Mississippi School of Law, founded the first full-time state judicial college in the nation. The college he founded later became known as the Mississippi Judicial College.[152] Established in 1970, the Judicial College was created as a part of the University of Mississippi Law Center with funds received from a block grant program of the Law Enforcement Assistance Administration (LEAA).[153] The purpose of the Judicial College was

> to improve the delivery of judicial services to the citizens of Mississippi by upgrading the state's court system by providing intensive education and training for the personnel of the judicial branch of Mississippi government, providing continuing research leading to modernization of court procedures, and publishing reference aids and instructive materials for

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[150] *Id.* § 5, at 1120.

[151] *Id.* §§ 11-12, at 1122.

[152] Resolution of the Conference of Mississippi Judges of April 25, 1996, *in* 2 MISSISSIPPI SUPREME COURT MINUTE BOOK 578-80 (1996).

[153] Arlen B. Coyle & Shannon Deen Turner, *The Federal Commitment to Crime Control and Its Influence on the Mississippi Judicial System*, 46 MISS. L.J. 817, 837 (1975).

court management and operation.[154]

In 1981, the Legislature began to provide funding for the Judicial College by creating a State Court Education Fund, which was specifically directed to the education and training of judges and other personnel in the supreme, circuit, chancery, county, family, justice, and municipal courts.[155] The money in the fund was to come from a court education and training fee that would be collected on all civil cases and on each conviction in all criminal cases in circuit, chancery, county, justice, and municipal courts in the amount of one dollar per case.[156] The amount imposed was increased to two dollars in 1985.[157]

In 1989, the Legislature began allocating the money collected on civil and criminal cases to two different funds.[158] Seventy-five percent of the money was deposited into the State Court Education Fund, and twenty-five percent was deposited into the State Prosecutor Education Fund, which would defray the cost of education for district attorneys, county prosecuting attorneys, and municipal prosecuting attorneys.[159]

The Legislature in 1990 repealed the statutes that provided for a two dollars assessment on criminal cases to be deposited in the State Court Education Fund[160] and began imposing fees for specific statutory violations. An assessment of seventeen dollars was to be collected from each person who received a fine or penalty for violation of title 63 of the Mississippi Code, Motor Vehicle and Traffic Violations.[161] Of this assessment, $1.50 would be given to the State Court Education Fund.[162] An assessment of $90 was to be collected from each person violating the Mississippi Implied Consent Law, $1.50 of which was given to the State Court Education Fund.[163] For game and fish law violations, an assessment of $42 was imposed, $1.50 of which would go to the State Court Education Fund.[164] An assessment of $37 was imposed for other misdemeanors with $1.50 going to the education fund,[165] and an assessment of $117 was imposed for other felonies of which $1.50 would be added to the fund.[166] In 1991, the Legislature created a third fund, the State Court Constituents Fund, which was to be used for the education and training of judges and court personnel. A fine of fifty cents was to be imposed on all civil and criminal cases and added to this fund.[167]

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[154] *Id.*

[155] Act of Mar. 20, 1981, ch. 368, 1981 Miss. Laws 879.

[156] *Id.* §§ 2-3, at 879-80.

[157] Act of Mar. 18, 1985, ch. 338, 1985 Miss. Laws 53.

[158] Act of Mar. 28, 1989, ch. 471, 1989 Miss. Laws 274.

[159] *Id.* § 2, at 275.

[160] Act of Mar. 12, 1990, ch. 329, 1990 Miss. Laws 53.

[161] *Id. See also* MISS. CODE ANN. §§ 63-1-1 through 63-25-11 (1999).

[162] Act of Mar. 12, 1990, ch. 329, 1990 Miss. Laws 53, 53.

Judicial education is mandated by the Rules and Regulations for Mandatory Continuing Judicial Education, which were adopted by the supreme court and became effective on January 1, 1988. The rules apply to supreme court justices, court of appeals judges, chancery, circuit, county, family and youth court judges, youth court referees, and senior judges.[168] Each judge is required to complete a minimum of twelve hours of continuing education offered by the judicial college each year, and new judges are required to take a training course within one year of taking office.[169]

Justice court judges are exempt from the rules but must comply with statutory requirements.[170] The Legislature made the Judicial College responsible for basic and continuing education of justice court judges in 1981. The basic training course for justice court judges consists of thirty-two hours of training and the continuing education course of eighteen hours.[171]

The importance of educational training for justice court judges was stressed in the case *In re* Cadle.[172] In that case, the Commission on Judicial Performance, on January 15, 1985, filed a formal complaint of judicial misconduct against Cadle, a justice court judge for the northern district of Prentiss County, because he had allegedly failed to complete the continuing education course required by statute.[173] On January 18, 1985, the Commission filed a petition for interim suspension asking the supreme court to suspend Cadle pending resolution of the formal complaint. After Cadle attended a make-up session on February 28, 1985, the Commission filed a motion to dismiss the petition for interim suspension. The Commission's findings of fact emphasized that the reason for the formal complaint and petition for interim suspension "was to insure the integrity of the statutorily mandated judicial education for justice court judges and to reaffirm the Commission's position on the importance of the educational program to the justice courts."[174] The supreme court sustained the motion, incorporated the Commission's findings of fact in its order by reference, and dismissed the case.[175]

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[163] *Id.* § 2, at 56.

[164] *Id.* § 3, at 57.

[165] *Id.* § 5, at 57.

[166] *Id.* § 6, at 57.

[167] Act of Apr. 9, 1991, ch. 512, 1991 Miss. Laws 665.

[168] RULES AND REGULATIONS FOR MANDATORY CONTINUING JUDICIAL EDUCATION 2.

[169] *Id.* at 3.

[170] *Id.* at 2.

[171] Act of Apr. 7, 1981, ch. 471, § 16, 1981 Miss. Laws 1266, 1278-79.

V. JUDICIAL DISCIPLINE

Judicial conduct in Mississippi is governed by the Mississippi Code of Judicial Conduct. The supreme court adopted the Mississippi Code of Judicial Conduct in 1973.[176] The Code, which was drafted by the American Bar Association, was recommended to the court by the Board of Commissioners of the Mississippi State Bar. The court adopted the Code with one minor change from the American Bar Association's version. The court recommended that the conference of the Mississippi Judges also adopt the Code.[177] The conference did consider the adoption of the Code at its June 1974 meeting[178] but, after discussion, passed a motion to adopt or defeat the Code at the conference's fall meeting.[179] The Conference of Judges adopted the Code on October 25, 1974.[180]

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[172] 466 So. 2d 79 (Miss. 1985).

[173] *In re Cadle*, 446 So. 2d at 80.

[174] *Id.*

[175] *Id.* at 79-80.

[176] *Code of Judicial Conduct*, MISS. LAW., Sept. 1973, at 1, 5.

[177] *Id.*

[178] Notice of Meeting of the Conference of Mississippi Judges (June 27-29,

On December 13, 1973, Chief Justice Robert G. Gillespie of the Mississippi Supreme Court convened the Mississippi Citizens' Conference on the Administration of Justice. Sponsors of the conference included the American Judicature Society, the Mississippi Judicial College, the Mississippi State Bar Association, and the University of Mississippi Law Center. Among the issues discussed by the more than seventy-five conference attendees was the issue of the discipline and removal of judges. The conferees adopted a report making recommendations at the closing plenary session of the conference.[181] With regard to judicial discipline, the Conference recommended the establishment of a commission to deal with judicial misconduct, stating:

> At present the only method for removing incompetent judges from office is the completely unworkable process of impeachment. A better means of judicial discipline and removal is needed. It is strongly recommended that Mississippi establish a judicial qualifications commission modeled upon the highly successful commissions now utilized in Florida, Arizona, and other states. This commission, which would operate under the supervision of the Mississippi Supreme Court, would conduct its business in confidence. It would not infringe upon judicial independence or review judicial decisions. It would also investigate complaints of physical or mental disability. The Commission would, in appropriate cases, recommend disciplinary action to the supreme court, which would act upon the recommendation.[182]

The Legislature did not create a commission as suggested by the Conference.

1974).

[179] Minutes of Annual Conference of Mississippi Judges (June 29, 1974).

[180] *See* 648-651 So. 2d XXXVIII (West Miss. Cases 1995).

[181] *Summary Statement*, MISSISSIPPI CITIZENS' CONFERENCE ON THE ADMINISTRATION OF JUSTICE 1.

[182] *Id.* at 4.

The Mississippi State Bar Association proposed the creation of a Judicial Qualifications Commission in 1976.[183] The Bar intended to present a bill to the Legislature, which would be a revised version of similar bills presented in 1968 and 1969; however, it did not pass the House "probably because it would have abolished the Legislature's power to remove judges by the impeachment process."[184]

In 1977, the Legislature established the Judicial Council of the State of Mississippi.[185] In 1978, the Judicial Discipline Committee of the Judicial Council, composed of Judge Emily Baker, Senator Herman DeCell, Mrs. Elizabeth Powers, and Chancellor Michael Sullivan,[186] drafted a proposed constitutional amendment and enabling legislation to create a Commission on Judicial Performance for Mississippi.[187] The preface to the amendment and legislation indicated the proposal resulted after the Committee had studied the commissions that were in existence in the forty-nine other states. The Committee favored creation of a commission that would "vest at the commission level the authority to receive information, investigate, conduct hearings, and make recommendations to the supreme court concerning allegations of judicial misconduct or disability."[188] The Committee felt this system would avoid multiple investigations, allow more determinations, and give the supreme court final disposition in every case.[189] The proposed amendment did not recommend that the section allowing for impeachment of judges be repealed. Instead, the Committee adopted the recommendation of the American Bar Association that impeachment be retained "as a check not only upon the judiciary, but upon the judicial discipline and disability retirement process as well."[190] The Mississippi Conference of Judges voted unanimously to support the judicial council's bill, and the supreme court also endorsed the bill.[191]

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[183] *Bar Proposed Scrutiny of Judges,* Miss. Law., Feb. 1976, at 1, 1.

[184] *Id.*

[185] Act of Mar. 31, 1977, ch. 429, 1977 Miss. Laws 650.

[186] Chancellor Michael Sullivan was appointed as a justice of the Mississippi Supreme Court in 1984 and served as a presiding justice until his death in February 2000.

[187] Judicial Discipline Committee, Mississippi Judicial Council, Proposed Constitutional Amendment and Enabling Legislation To Create a Commission on Judicial Performance for the State of Mississippi.

[188] *Id.* at 1.

[189] *Id.* at 2.

In 1979, the Legislature responded to the need for a judicial disciplinary body and adopted a resolution proposing to add a new section to the constitution, section 177A, which would authorize the Legislature to create a Commission on Judicial Performance.[192] The Legislature also passed an act that provided for the membership of the Commission, terms of office of commission members, private admonishment of judges, and commission rules and regulations.[193] The Act was to take effect after January 1, 1980, if the new constitutional section was adopted in the general election.[194] The resolution was ratified by the voters in November 1979. The supreme court approved the Rules of the Mississippi Commission on Judicial Performance on July 9, 1980.[195]

Only recently has the question of whether the Commission has authority to impose sanctions on a judge been raised. In the case *Mississippi Commission on Judicial Performance v. Dodds*, the Commission recommended that Dodds be removed from office, and Dodds contended that the Commission had no authority to remove him from office because section 177A of the constitution providing for the Commission had never been approved by the U.S. Department of Justice as required by section 5 of the Voting Rights Act.[196] Section 5 of the Act requires a state to preclear practices dealing with voting with the U.S. Department of Justice if the state has a history of discriminatory voting practices.[197] Mississippi has been required to preclear its legislation.[198] The supreme court determined that the four types of changes covered by section 5 were (1) the manner of voting, (2) candidacy requirements and qualifications, (3) composition of the electorate voting for candidates, and (4) creation or abolition of an elective office.[199] The court held that section 177A did not have to be precleared because it did not involve any of these four changes.[200]

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[190] *Id.* at 9.

[191] *Judges Endorse Discipline Bill*, MISS. LAW., Dec. 1978, at 1, 1.

[192] H.R. Con. Res. 33, 1979 Leg., Reg. Sess., 1979 Miss. Laws 1141.

[193] Act of Apr. 18, 1979, ch. 511, 1979 Miss. Laws 1105.

[194] *Id.* § 15, at 1107-08.

[195] 385-390 So. 2d XXI (West Miss. Cases 1980).

[196] Mississippi Comm'n on Judicial Performance v. Dodds, 680 So. 2d 180 (Miss. 1996).

[197] *See* Voting Rights Act of 1965 § 5, 42 U.S.C.A. § 1973c (West 1994).

VI. RULE-MAKING AUTHORITY

In 1975, the supreme court decided the case of *Newell v. State*.[201] Prior to that time establishing rules governing procedure in the courts had been the prerogative of the Legislature. In *Newell*, the supreme court asserted its inherent power to prescribe rules of procedure. Newell was convicted of assault and battery with intent to kill and sentenced to a term in the state penitentiary.[202] He appealed contending that he was deprived of a fair trial because the court improperly granted or refused certain jury instructions.[203] The court held that although the trial court did not err in refusing to grant an instruction advising the jury that the state has the burden of proving every material allegation in the indictment to a moral certainty and beyond all reasonable doubt, the result of the refusal was to leave the jury uninstructed as to the proper burden of proof.[204] The court noted that the case was indicative of

> a discrepancy in our state's legal procedure that has literally cost thousands of dollars in new trials, untold expenditure of time, docket congestion and prolonged litigation. It points out the inability of a trial judge to instruct a jury as to the applicable law of a case due to legislative enactment and the decisions of this Court. More importantly, and aside from the practical considerations mentioned, this prohibition has been

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[198] *Dodds*, 680 So. 2d at 202.

[199] *Id.* at 206.

[200] *Id.*

[201] 308 So. 2d 71 (Miss. 1975)

[202] *Newell*, 308 So. 2d at 72.

[203] *Id.* at 73.

[204] *Id.* at 74.

> in the past, and now is, an impediment to the administration of justice that can no longer be indulged in courts of constitutional origin and which should not be tolerated in courts otherwise ordained since all share a common purpose—the fair and efficient administration of justice.[205]

The court said that although it was aware of and respected the Legislature's suggestions regarding procedural rules, the court has the "inherent power to prescribe rules of procedure to facilitate the administration of justice in the courts throughout the state" but would consider legislative rules as long as the rules "coincide with fair and efficient administration of justice."[206]

On April 7, 1975, the Legislature passed an act giving the supreme court the power to prescribe rules of evidence and procedure of the circuit, chancery, and county courts in civil actions.[207] The Act also created an advisory committee on the Rules of Civil Practice and Procedure to make a study of rules of procedure and draft such rules as would aid in the administration of justice to submit to the supreme court for its consideration.[208] Finally, the Act required the supreme court to submit any proposed rules to the Legislature for its approval.[209]

In 1978, the Legislature required circuit, chancery, county, youth, and family courts to submit proposed local rules to the supreme court. The rules, including any that had been adopted prior to passage of the Act, were to be approved by the supreme court before they became effective.[210]

In 1981, the supreme court asserted its inherent power to adopt rules of procedure pursuant to *Newell v. State*. The assertion of power came after the Legislature had rejected the proposed Rules of Civil Procedure drafted by the Advisory Committee on the Rules of Civil Practice of Procedure and submitted to the Legislature by the supreme court pursuant to statute.[211] On May 26, 1981, the court issued the order adopting the Rules of Civil Procedure for all chancery, circuit, and county courts to be applicable in all civil actions filed on or after January 1, 1982.[212] The order provided that the new rules controlled if any statutes or rules previously adopted were in conflict with them.[213] Following his State of the Judiciary Address in which Chief Justice Neville Patterson asked for the support of the bench and bar in making the rules useful, the Board of Commissioners of the Mississippi Bar voted to have the Continuing Legal Education Committee hold a series of seminars throughout the state to educate attorneys on the new Rules of Civil Procedure.[214]

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[205] *Id.*

[206] *Id.* at 78.

[207] Act of Apr. 7, 1975, ch. 501, § 15, 1975 Miss. Laws 771, 789.

[208] *Id.* §§ 17, 19, at 789-90.

[209] *Id.* § 20, at 790-91.

[210] Act of Mar. 23, 1978, ch. 425, 1978 Miss. Laws 694.

The Legislature, in 1982, restricted the effect any rules promulgated by the supreme court would have if they had not first been submitted to the Legislature for approval.[215] If the rules were not submitted according to the procedure established by the Legislature, they were to be of no force and effect.[216] In 1991, the Legislature amended all sections of the Mississippi Code to conform to rules of procedure, which had been adopted by the supreme court, and repealed all sections that were superseded or conflicted with rules adopted by the court.[217] In 1996, the Legislature repealed the Code sections that required the court to submit the rules to the Legislature for approval.[218]

With the creation of the court of appeals in 1993, the Legislature charged the supreme court with prescribing rules that would govern proceedings in the court of appeals.[219] On December 15, 1994, the supreme court adopted the Mississippi Rules of Appellate Procedure, which would govern practice in both the court of appeals and the supreme court.[220] The Rules of Appellate Procedure were based on the Supreme Court Rules, which had been in effect since January 1, 1988.[221]

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[211] Foreword, *Symposium on Mississippi Rules of Civil Procedure*, 52 MISS. L.J. 1, 1 (1982).

[212] 395-397 So. 2d 1 (West Miss. Cases 1981).

[213] *Id.*

[214] *Supreme Court Orders New Rules for State Courts*, MISS. LAW., July-Aug. 1981, at 8, 8.

[215] Act of Mar. 3, 1982, ch. 321, 1982 Miss. Laws 116.

[216] *Id.*

[217] Act of Apr. 12, 1991, ch. 573, 1991 Miss. Laws 979.

[218] Act of Mar. 19, 1996, ch. 384, § 7, 1996 Miss. Laws 150, 151.

[219] Act of Apr. 15, 1993, ch. 518, 1993 Miss. Laws 654.

VII. Conclusion

The Mississippi judicial system has seen great growth during the past 100 years. Through the cooperative efforts of the Mississippi Judiciary, Legislature, and the Mississippi Bar the framework and structure of a judicial system was established that would meet the demands of the present caseload. Whether the court structure currently in place will continue to meet the needs of the citizenry is a question that must be continually asked and studied. As we have learned from past history, the needs of the courts are never static and must be addressed before they reach crisis proportions.

Much improvement has also been made in building public confidence in the judicial system. An administrative structure is now in place that is beginning to bring continuity and stability to the entire judicial system. With the adoption of rules governing judicial conduct and judicial education, Mississippi's judges are better trained for the offices they hold and are held accountable for their misconduct.

In January 1998, all sections of the Mississippi Judiciary-supreme court, court of appeals, chancery, circuit, county, justice, youth, and municipal justices/judges committed to these standards:

(1) Access to the court system for all people;

(2) timeliness and efficiency of court hearings;

(3) fairness, equality, and integrity of decisions;

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[220] 644-647 So. 2d XXI (West Miss. Cases 1995).
[221] *Id.*

> (4) independence of the judiciary, but accountability for resources; and
>
> (5) increasing public trust and confidence in the judiciary.

Thus, the judiciary responded by reaffirmance to principles for which the judiciary has always been committed.

Because of the progress that was made during the past century the judicial system enters the new millennium in the best position possible. It is our responsibility in the next 100 years to continue to strengthen the existing foundation and to have the vision and foresight to plan for future needs.

OVERCOMING BARRIERS TO CIVILITY IN LITIGATION

Judge Marvin E. Aspen[1]

Nearly eight years have passed since the Committee on Civility of the Seventh Federal Judicial Circuit issued its final report.[2] Since then civility has been a popular topic on the legal lecture circuit,[3] jurists and legal scholars have written about the importance of civility,[4] and numerous jurisdictions and bar associations have adopted civility codes.[5] Despite continued loud protests from certain individuals that civility is inconsistent with the practice of litigation,[6] many lawyers are clamoring for increased civility as a way to help the law regain some of the respect it has lost, control litigation costs, and improve service to clients.[7] But has the legal profession actually become more civil?

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[1] On July 24, 1979, Judge Aspen was appointed by President Carter to the United States District Court for the Northern District of Illinois. On July 1, 1995, he was elevated to Chief Judge. The assistance of Melanie Berkowitz in preparing this article was invaluable, in particular her insights as a woman litigator.

[2] 143 F.R.D. 441, 443 (1992). Judge Aspen served as the chair of the Committee. This committee issued an interim and final report [hereinafter *Final Report*] and promulgated civility standards that were subsequently adopted by the Seventh Circuit and by courts and bar associations nationwide [hereinafter *Civility Standards*].

[3] *See* Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STET. L.R. 253, 253 (1998).

[4] *Id. See supra* notes 1, 3, and accompanying text.

[5] Aspen, *supra* note 3. *See supra* note 2 and accompanying text.

[6] *See, e.g.,* Shawn Collins, *Podium: Be Civil? I'm a Litigator!*, NAT'L L.J., Sept. 20, 1999, at A21 ("So I get annoyed, and sometimes genuinely infuriated, at these self-anointed 'civility' police who lately have pitched their tents at our local bar associations. Seemingly every lawyers' group in America now has a 'civility' committee, chock full of patriotic citizens scolding their fellow practitioners into the belief that our highest duty is no longer to win for our clients, but rather to be nice to our adversaries."); Monroe Freedman, *Stress on Civility Strains Counsel*, CONN. L. TRIB., Sept. 18, 1995, at 19 (arguing that "[f]or an increasing number of judges, civility means that lawyers should sacrifice their clients' interests in order to protect 'brother lawyers' from malpractice claims—for example, not raising a statute of limitations that opposing counsel has missed").

I have previously documented some of the reasons for the rise of incivility in the practice of law in the past two decades.[8] The civility movement is an important first step in the right direction, but the road to changing the culture of professional relationships is a difficult one. In this article, I discuss several additional reasons why lawyers may find civility in their practice so difficult to achieve. As I have written, some of these "barriers to civility" are a result of the changes the legal profession has experienced over the years.[9] Litigation has always been adversarial, but in recent years it has become more expensive, busier, more competitive, and more complex: traits that increase pressures on individual lawyers and can lead to the deterioration of civility as a whole. Additionally, the characters and backgrounds of lawyers practicing today are much more diverse than even twenty years ago.[10] This diversity has altered the norm of acceptable behavior in litigation, and some attorneys still do not understand what constitutes proper conduct when opposing counsel is a member of the opposite sex or of another race. But the obstacles are not insurmountable, and recognizing them is half of the solution. If an attorney approaches each new case while not only aspiring to be civil, but also having the knowledge of how civility might break down, he or she will be better prepared to maintain a civil demeanor and not get swept up into the sort of

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[7] *See, e.g.*, Anthony T. Kronman, Editorial, *How Lawyers Can Regain the Public's Respect*, N.Y. TIMES, Sept. 28, 1995, at A26; Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283 (1996).

[8] *See, e.g.*, Jeffrey Cole, *Interview with the Honorable Marvin E. Aspen*, ABA LITIG. MAG., Feb. 4, 1996, at 94.

[9] *Id. See also* Marvin E. Aspen, *The Search for Renewed Civility*, 28 VAL. U. L. REV. 513, 515 (1994).

[10] *See infra* notes 15, 16, and accompanying text. In the last 20 years, women's enrollment in first-year law school classes has grown from 36% to 47%. Minority enrollment has risen from approximately 10% in first-year classes to 21%.

"uncivil one-upmanship" that some litigation becomes. To that end, I also offer some ideas for overcoming the barriers to incivility, including suggestions for prevailing over uncivil opposing counsel while simultaneously zealously advocating for your client.

I. BARRIERS TO CIVILITY

A. The Changing Practice of Law

Today, many lawyers with thirty or forty years of practice behind them bemoan the "good old days" when lawyers adhered to Shakespeare's quote from The Taming of the Shrew, to "do as adversaries do in the law, strive mightily, but eat and drink as friends."[11] There were fewer lawyers handling fewer cases, and civility was more prevalent because you were likely to oppose the same attorney again and again.[12] And although some lawyers today believe that their boorish behavior will simply get lost among the multitude of attorneys they face, there are signs that as legal practices become more specialized, the same lawyers will again oppose each other more than once. Boutiques are springing up or spinning off of larger firms to specialize in any number of narrow and unique issues. Ask any employment lawyer how many times he or she has litigated against the same opposing counsel and the answer will probably be quite a few.[13]

Unfortunately, there is little sign that the renewed possibility of opposing the same attorneys numerous times has increased civility in the law. Other changes in the legal profession have put pressures on attorneys unheard of twenty or thirty years ago. For example, in response to the survey sent by the Committee on Civility of the Seventh Federal Judicial

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[11] WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act 1, sc. 2.

[12] *See, e.g.,* Marvin E. Aspen, *What We Can Do About the Erosion of Civility in Litigation,* 35 JUDGES' J., Fall 1996, at 32, 33.

[13] *See, e.g.,* Sandra Terry, *Disorder in the Court! New Codes Call for Good Behavior,* WASH. POST, June 24, 1996, at 7 (quoting lawyer who explained that one rarely sees "Rambo lawyering" in divorce cases because same attorneys are likely to face one another repeatedly).

Circuit to attorneys regarding civility in the profession, one lawyer responded:

> The legal profession as such is almost extinct—the business is booming. Too many lawyers are intent on money rather than service. The ever watchful, reporting computers push firms' members to compete on hours and fees to the detriment of service and responsibility. Some of this pressure also leads to contriving hours and charges. The whole, stressful urgency of it makes it harder to be congenial and understanding.[14]

Combined with these pressures is the fact that the legal profession has become much more diverse. Women make up forty-seven percent of first-year law students, compared with seven percent thirty years ago.[15] Minority attendance at law school has nearly tripled since 1971.[16] Obnoxious behavior that might have been tolerated (or even admired) if it occurred between two male lawyers is untenable today. For example, consider the following exchange from a recent deposition, which the court of appeals in Maryland reproduced in its opinion as part of its justification for imposing sanctions on defendant's counsel:

> Mr. A (defense counsel), upon being told that his client's comment during the deposition was in poor taste: It must have been in poor taste if Miss B (plaintiff's counsel) says it was in poor taste.
>
> Ms. B: You got a problem with me?
>
> Mr. A: No, I don't have any problem with you, babe.
>
> Ms. B: Babe? You called me babe? What generation are you from?
>
> Mr. A: At least I didn't call you a bimbo.[17]

Expressing its displeasure in attorneys who engage in so-called

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[14] *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 378 n.1 (1991) [hereinafter *Interim Report*].

[15] American Bar Association statistics on enrollment, (visited on Feb. 8, 2000) <http://www.abanet.org/legaled/stats.html>.

[16] *Id.*

[17] Mullaney v. Aude, 730 A.2d 759, 761-62 (Md. App. 1999).

"sexual trial tactics,"[18] the court suggested that increases in opportunities for women and minorities has coincided with the unwelcome increase in incivility, quoting Judge Paul L. Friedman of the United States District Court for the District of Columbia:

> Although the "modern age" of the legal profession has witnessed progress in opening its doors wider to women and minorities and others who were previously excluded, this age has also opened its doors to the "Rambo litigator" which has spawned a generation of lawyers, too many of whom think they are more effective when they are more abrasive.[19]

It is possible that the increase in "Rambo litigation" is a biproduct of the legal profession becoming more competitive, more cost sensitive and more frantically paced, in which case any solution must focus on the bottom line, demonstrating that such techniques are inefficient. I address such solutions in Part II. But to the extent that incivility is a result of some lawyers not knowing how to react to the greater diversity in the legal profession—and the corresponding redefinition of what constitutes acceptable behavior—our responsibility must also focus on the behavior rather than merely its result. For while personal attacks based on gender or race serve to delay the litigation process in the same way general incivility does, such behavior is also inappropriate on its own, apart from the inefficiencies it creates.

The court in *Mullaney v. Aude* recognized that sexual trial tactics "disgrace the entire legal profession and the system of justice that provides a state for such oppressive actors."[20] The Seventh Circuit agrees, once admonishing an attorney that

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[18] *Mullaney*, 730 A.2d at 767, quoting Lynn Hecht Schafran, *Women as Litigators: Abilities v. Assumptions*, TRIAL, Aug. 1983, at 36, 38 (quoting Jill Wine-Banks).

[19] Judge Paul L. Friedman, Fostering Civility: A Professional Obligation, Remarks at a Meeting of the American Bar Association Section of Public Contract Law, Annapolis, Md. (March 13, 1998) (unpublished manuscript, on file with the *Mississippi Law Journal*).

[20] *Mullaney*, 730 A.2d at 767 (quoting Judge Waldron).

"[p]ersonal attacks on counsel and remarks that disparage others on the basis of sex or race have no place in the courtrooms of this Circuit."[21] Gender-specific incivility is an unpleasant by-product of the positive move towards increased diversity in the legal profession. It is every bit as inappropriate as sexual-harassment in the workplace, and practitioners must work together with the courts to see that it is ended.

B. Teaching New Attorneys Bad Habits

Much has been written on the pressures young lawyers face at the beginning of their practice: pressures to impress their partners, impress their clients, and bill more hours than ever before.[22] The belief of many new lawyers that they must be not only aggressive, but also belligerent and combative in order to be successful is often fostered by the partners for which the young lawyers work. Partners face many of the same pressures as new attorneys, as well as having the added burden of having to sell business and retain clients, and the incivility they might display is too often copied by eager young associates who have never even considered that there might be another way to practice.[23] And in some cases, incivility is purposely passed on from partner to associate. Soon after the Committee issued its interim report on civility in the Seventh Circuit, this article's author received an article from a senior partner at a large Chicago law firm lamenting the way some partners are "mentoring" new associates in the ways of deceptive, obstructionist litigation. The article described a senior partner indoctrinating a new associate by telling her "[a]ll this baloney about ethics and civility is a waste of time," and by explaining to her that sneaky tricks to intimidate witnesses or confuse opposing counsel are necessary to win cases. After making his point that young associates will absorb and adopt such tactics—even against their better judgment—if they believe that is what is expected of them, the author stated that "[n]ew lawyers look to those more experienced to learn how to be effective, prosperous and long-lasting. Those experienced lawyers have a duty and responsibility to set the right example and to refuse to permit unprofessional conduct."[24]

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[21] Tyus v. Urban Search Management, 102 F.3d 256, 261 (7th Cir. 1996).

[22] *See, e.g.*, Marvin E. Aspen, *From the Bench: Doing Something About Civility in Litigation*, LITIG., Winter 1992, at 3, 4.

[23] *See, e.g.*, James W. McElhaney, *The Legal Weasel Trap*, A.B.A. J., Jan. 2000, at 68-69. The author described a deposition during which a young attorney continually reworded the deponent's answers to mean the opposite of what the witness had said. When opposing counsel objected, the young attorney protested, "I'm supposed to shape the witness' testimony! That's my job!" McElhaney responds with dismay that young attorneys think being a "weasel" is part of their job. *Id.*

We all share the responsibility to mentor and teach new lawyers about balancing zealous advocacy on behalf of clients with notions of civility and fairness. One recent case demonstrates the serious consequences of failing to instruct properly our young attorneys about notions of civility and fair play. In *Providian National Bank v. McGowan*,[25] the court sanctioned both the defendant's law firm and the individual attorney handling the matter for filing a frivolous response to a motion to dismiss after both had been warned about the tactic on several occasions and then for failing to attend the sanctions hearing. The individual attorney had been practicing for only two years and received a $3,000 sanction ($1,500 per occurrence); the sole shareholder of the firm had over twenty-five years of experience and received a $17,000 fine ($8,500 per occurrence) on behalf of the firm because "[the sole shareholder] should be aware of his firm's activities, he should have procedures in place to review his associates's work product, and he should have attended the sanction hearing."[26] After admonishing the sole shareholder, the court explained why the newer attorney received a lesser fine:

> This Court is sympathetic to young attorneys who start out in this crowded profession, work long hours, and settle for jobs they have no interest in. Nevertheless, these attorneys

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[24] Thomas R. Mulroy, Jr., Editorial, *Civility, Mentors and the Good Old Days*, CHICAGO LAWYER, Sept. 1991, at 14.

[25] 687 N.Y.S.2d 858, 863-865 (N.Y. 1999).

[26] *McGowan*, 687 N.Y.S.2d at 864.

> must show the proper respect for the courts and other members of their profession by making court appearances or following the proper procedures for applying for necessary adjournments.
>
> The only mitigating factor this Court can consider here is the amount of time [the young attorney] has been a member of the New York State bar.[27]

Whether we take steps to instruct new attorneys formally about the practice of law, or expect them to learn by example, we must keep in mind what lessons we are teaching. If we sometimes take lightly the importance of civility in our own practices, or fail to address unprofessional behavior in those lawyers who work for us, we cannot expect that our aspirations for increased civility in the legal profession will be realized.

II. MAINTAINING AND INCREASING CIVILITY

My discussion above suggests that recognizing situations where incivility might occur is the first step to insuring that it does not. If you plan how to react to uncivil, combative, or boorish behavior before you are in the middle of a heated lawsuit, it will be easier to respond civilly, on your own terms, instead of feeling pressured to fight back. Too many lawyers believe that if they don't "fight fire with fire" their opponent will somehow gain a tactical advantage. However, it demonstrates strength and integrity to be firm in one's convictions without being nasty, patronizing, or obstinate. An attorney who believes that civility is incompatible with aggressive litigation does a disservice to his or her client because he or she has not recognized that there is a difference between zealous advocacy and overzealous representation that wastes time and inspires the court's (and opposing counsel's) ire.

For example, consider the opinion of the attorney set forth in footnote six, *supra*, who believes that acting civilly is tantamount to putting his relationship with opposing counsel before his loyalty to his client. This is a common misconception about civility among its detractors who do not understand that there is a real difference between playing tough but fair and engaging in delaying tactics or personal attacks whose purpose is to annoy or demean the other side. It does not advance a party's case if its attorney calls the opposing counsel "babe" or "bimbo" during a deposition. It will not bring a case to a swift resolution if one attorney files frivolous motions and then refuses to attend the ensuing sanctions hearing. And notions of efficiency are not served by a party who fights with opposing counsel over discovery, employing such tactics as attempting to cancel a deposition when opposing counsel was already en route and refusing to produce relevant documents without a court order.[28] When lawyers and judges discuss improving civility in the law, it is these sorts of tactics they condemn, and no lawyer should feel intimidated by an opposing attorney who justifies such actions in the name of zealous advocacy.[29]

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[27] *Id.* at 865.

A. *Using the Courts*

If you find yourself litigating against an attorney who insists on misbehaving, there are ways of using the court system to your advantage without appearing petty and without engaging in the same behavior as your opponent. For example, consider the following exchange between two opposing attorneys during the deposition of the plaintiff's mother. Defense counsel was expressing concern over plaintiff's counsel "hitting" the deponent as a signal to her that she should not answer a particular question:

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[28] Chevron Chem. Co. v. Deloitte & Touche, 501 N.W.2d 15, 16 (Wis. 1993) (trial court imposed sanctions on defendant's counsel four times during discovery for employing various delaying tactics including those described above). For further discussion of this case, including the Wisconsin Supreme Court's decision to affirm the entry of judgment for the plaintiff as a sanction for Deloitte's outrageous conduct during trial, see Aspen, *supra* note 3, at 260.

[29] For another example of "zealous advocacy" crossing the line and becoming uncivil, even unethical behavior, see the discussion of *Feld's Case*, 737 A.2d 656 (N.H. 1999), *in* Thomas E. Zehnle, *Lawyer Censured for Failing To Correct Client's Perjury*, LITIG. NEWS, Jan. 2000, at 5. In that case, a lawyer knowingly submitted false answers to interrogatories and failed to correct his client's perjury, later telling the court that a cause of the incident was the acrimonious relationship between the parties. The court responded that "a client's confrontational or caustic relationship with an opposing party cannot excuse the attorney's professional misconduct." *Id.*

> Ms. A (Defense counsel): And, [Mr. H], if you hit your client one more time –
>
> Mr. H: I'm not hitting her. I'm just touching her to get her attention. What's the matter with you?
>
> Ms. A: You're hitting her on the arm.
>
> Mr. H: You're paranoid.
>
> Ms. A: [Mr. H], you're abusive and I'm tired of it.
>
> Mr. H: No. You're paranoid. I just touched her on the arm to get her attention. That's not hitting her.
>
> Ms. A: You hit her three times.
>
> Mr. H: Where do come up with these things? You're disgusting and paranoid. I've never seen a woman like you. How did you get a license?[30]

The above exchange was one of numerous incidents during the deposition in which the plaintiff's attorney fought with defense counsel, demeaned her, cursed, and made light of the fact that he (plaintiff's attorney) had already been sanctioned $750 and that the defendant "would never see a nickle of it." The appellate court determined that defense counsel did not bias the trial court against the plaintiff by filing a motion for sanctions based on plaintiff counsel's behavior, stating that "defendant's counsel was more than justified in calling the trial court's attention to the obstructive, offensive and unprofessional conduct that plaintiff's counsel displayed during the course of the deposition."[31]

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[30] Wences v. Midwest Fast Foods I, Inc., No. 88-592, slip op. at 15-16 (Okla. Ct. App. Aug. 6, 1997).

[31] *Id.* at 15. Another example may be found in *5500 North Corp. v. Willis*, 729 So. 2d 508, 512 (Fla. Dist. Ct. App. 1999), where plaintiff's attorney named an additional 12 witnesses one week before the discovery cutoff and then refused to cooperate with opposing counsel in scheduling depositions of such witnesses, and also refused to attend their depositions. The court held that the plaintiff's attorney was not entitled to the attorney's fees he incurred attending a sanctions hearing seeking to disqualify defendant's counsel for incorrectly questioning one of the witnesses about information protected by the work-product privilege. In denying the fees, the court stated that "[Plaintiff's counsel] substantially contributed to

The above case demonstrates the willingness of more and more judges to reward attorneys who remain civil when confronted by behavior that is unprofessional or worse, so long as the attorneys make their record and respectfully advise the court of their opponent's incivility.[32] The court's opinion reprints three portions of the deposition, pointing out how the defendant's attorney admirably maintained her composure while informing the plaintiff's attorney that she did not approve of his behavior.

In contrast, consider a case in the Northern District of Illinois.[33] In *Chapsky v. Baxter Healthcare Corp.*,[34] the parties' discovery disputes escalated into all-out hostility, which resulted in each party filing numerous motions seeking to punish the other side for its behavior. In denying all of the motions and ordering the parties to obtain prior court approval before proceeding with further discovery, the trial judge stated that

> [t]he court will not condone either party's actions in this case by granting the pending motions. It is clear that the legal misconduct alleged is as much attributable to the parties' failure to get along on a personal level as it is to a failure to comply with the law. . . had the parties conducted themselves civilly, they may have been able to resolve these issues early on, without recourse to the court.[35]

This case illustrates the importance of parties making every effort to get along themselves before going to court for help with disputes. An attorney who consistently refuses to fight back and perseveres in maintaining a civil demeanor may eventually convince opposing counsel that his or her petty behavior is succeeding only in prolonging the case and increasing costs for everyone. It takes two parties to maintain an argument, and if one side refuses to fight, the other side might

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this problem by his contumacious conduct." *Willis*, 729 So. 2d at 513.

[32] *See, e.g.*, Marvin E. Aspen, *It's How You Play the Game*, TRIAL, July 1998, at 28, 30.

[33] For an earlier discussion of this case, see Aspen, *supra* note 3, at 265.

[34] 1994 WL 327348 (N.D. Ill. July 6, 1994).

[35] *Chapsky*, 1994 WL 327348, at *1.

begin to feel foolish especially if he or she acts poorly in front of the judge.[36]

B. Education

The sixth recommendation in the *Final Report* encourages law schools to discuss the Standards for Professional Conduct in the classroom and among the faculty. Most law students do not realize the kind of pressures they will face when they begin practicing and are unaware that there is an alternative to being combative. It is unnerving for many new attorneys when they first encounter uncivil behavior from opposing counsel. Making law students aware of the civility code and teaching them to recognize situations where they might be confronted with incivility can help combat the pressure to be combative that they might feel as new associates.

Similarly, the *Final Report* encourages law firms, public law offices, and corporations with in-house counsel to establish civility training programs. If law firms teach and practice civility, and let their associates know the firm will support and help them when they are faced with uncivil opposing counsel, new attorneys might not learn the bad habits practiced by their more senior colleagues. There are certainly enough judicial cases and articles circulating to put new attorneys on notice that unprofessional behavior will not be tolerated in many courtrooms, and the ABA has recently adopted the *Civility Standards* for its members, captioned as Guidelines for Litigation Conduct.[37] Some law firms are also creating "ombudsman"-type positions to give new attorneys an outlet for their concerns. The attorneys in these positions can help support young associates who feel pressured to engage in "Rambo-style litigation" even if such methods do not make them comfortable.

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[36] *See, e.g.*, Cornelia Wallis Honchar, Editorial, *Right To Remain Silent Can Quiet Incivility*, CHI. DAILY L. BULL., May 2, 1997, at 5 ("I've had to learn to remain calm and believe in myself. . . . I close my mind to the nasty words, the snide remarks. . . . Remaining calm before a ranting lawyer is the best way to defuse the problem—joining the fray is as stupid as adopting your opponent's theory of the case.")

[37] Adopted at the ABA annual meeting, Toronto, Canada, 1998 (visited on Feb. 8, 2000) <http://www.abanews.org/litigation/litnews/practice/guidelines.html>.

But our responsibility goes beyond new practitioners and extends to all lawyers. At a time when corporate clients are putting more and more pressure on their law firms to reduce costs, incivility simply does not make good business sense. Imagine a three-hour deposition in which eighteen minutes were taken up by the attorneys bickering on the record. Few if any lawyers would enjoy telling their firm's billing committee that the client insists on an extra ten percent discount on its bill because it refused to pay for time not related to the deposition. And if the court had limited the deposition to three hours and no more, imagine how much information would have been lost because the attorneys wasted time fighting.

As more judges make pronouncements from the bench expressing their displeasure at the uncivil behavior of attorneys, law firms will be well served to address the issue among the partnership. The legal profession has changed tremendously since many senior partners began their practices, and conduct that might have been overlooked at one time cannot be tolerated today. And while I do not advocate quashing a lawyer's particular hardball style that he or she may have spent years developing, everyone must recognize that there is a difference between being tough but fair and engaging in outrageous behavior that serves no purpose but to irritate or delay.

III. CONCLUSION

There are of course other reasons that attorneys may believe that it is difficult or otherwise undesirable to act civilly in their practice. No matter what the reason, however, it is evident that incivility should not and will not be tolerated by judges, clients, or opposing counsel. The solutions I have proposed address some of the most basic barriers to civility and hopefully provide attorneys with a feasible response to an adversary who insists on employing tactics that annoy and delay. If even one side in every lawsuit maintains its civility, firmly and consistently presenting its case without giving into the hostile behavior of the other party, the tenor and length of the entire case would be improved without sacrificing the outcome for the more "civil side." Add the assistance of judges who refuse to tolerate tactics that insult or delay, and misbehaving attorneys will realize that they can no longer get away with brow-beating their opponents. Finally, the support of law schools and law firms in encouraging adherence to civility standards will teach this and future generations of lawyers that there is a way to strike a balance between zealous advocacy and civil behavior.

As I said in a 1998 speech at the University of Mississippi School of Law, I am convinced that the legal profession is more than willing to meet its responsibilities and provide leadership in bringing civility to the practice of law and in helping to renew citizen respect for and confidence in the judicial system.[38] We *can* combine zealous advocacy with civility without sacrificing either ideal, and I am certain we will not need to wait another eight years before we see even more positive results.

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[38] Marvin E. Aspen, *Some Thoughts on Professionalism and Civility for Law Students*, Speech to University of Mississippi School of Law (Oct. 1, 1998).

CHILD SUPPORT ORDERS: THE COMMON LAW FRAMEWORK— PART II

Deborah H. Bell[*]

This article is Part II of a study of child support awards in Mississippi. The entire article includes an examination of federal and state roles in child support, an overview of child support in general, and a comprehensive review of Mississippi law governing child support. Part I of the article discussed federal regulation of initial child support awards and the resulting Mississippi guidelines for initial awards. This article, Part II, explores the common law framework in which the federally regulated awards are set—the theoretical basis for child support, persons entitled to support and those responsible for support, and standards for modifying or terminating support awards. The article also discusses federal regulation of child support enforcement and resulting enforcement efforts in Mississippi.

I. THE COMMON LAW DUTY OF SUPPORT

The duty of both parents to support a child is recognized and regulated by statute in every state today. Surprisingly, the common law roots of the duty are not well articulated.[1] The duty has been identified at various times as a moral duty, a corollary of custody, and an obligation to the state. Blackstone described the father's natural law duty to support children as a moral obligation stemming from responsibility for bringing the child into the world.[2] The first explicit child support laws in England were aimed at preventing children from becoming wards of the parish. The Elizabethan poor laws obligated fathers to support their children at the risk of prosecution for shirking their duty.[3] In this country, nineteenth-century courts and legislatures began to establish parental support duties flowing from the parent's custodial rights.[4] By the early twentieth century, almost all states had enacted child support statutes, generally imposing the obligation on the father alone and defining the duty in vague terms such as "just" or "reasonable."[5] The modern explanation for the support duty is simply that the obligation serves the best interests of the child and of society.[6]

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[1] *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.1, at 710, n.5 (2d ed. 1987); The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Tentative Draft No. 3, Part II, (April 8, 1988), at xxv.

II. CHILDREN ENTITLED TO SUPPORT

A. *Support in the Intact Family*

1. *The Family Zone of Privacy*

The parental duty of support is not closely policed in the intact family. In deference to family privacy,[7] a parent's failure to support is usually sanctioned only at the level of neglect. In the intact family, children are not legally entitled to a standard of living above a minimum level of care[8] and have no direct cause of action against their parents even for this minimal support.[9] Instead, the remedy for neglect is state supervision by child protective services or removal of the child from the home.[10] The Mississippi Supreme Court in 1919 held that, to preserve the repose of families and in the best interests of society, "The moral obligation of a parent to support his child is not directly enforceable, and a court of equity cannot compel this duty."[11] In contrast, outside the protected confines of the intact family—after separation, divorce, or annullment, or when children are born out of wedlock—the state intervenes to establish support at a level appropriate to family income. For example, while children of divorce can obtain enforceable support orders for specific items such as orthodontic treatment, provision of an automobile, health and life insurance, or a college education, children of married parents who fail to provide such items are without legal recourse.[12]

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[2] *See* FAMILY LAW AND PRACTICE, § 33.02[3][a], at 33-7 (Arnold H. Rutkin ed. 1999), Leslie D. Harris, D. Dennis Waldrop, & Lori Rathburn Waldrop, *Making and Breaking Connections Between Parents' Duty To Support and Right To Control Their Children*, 69 OR. L. REV. 689, 692-708 (1990).

[3] Rutkin, *supra* note 2, § 33.02[1], at 33-5, (citing 43 Eliz. 1, c.2 § 1.iii (1601)).

[4] Harris, *supra* note 2, at 692-708.

[5] The American Law Institute, *supra* note 1, at xxvi.

[6] Harris, *supra* note 2, at 692-708.

[7] *See* Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1144-45. The writer notes that the state views intrafamily relations as "a private rather than governmental concern." and intervenes only to govern entry into the family (marriage, adoption) and dissolution of the family (divorce, annulment). *Id.*

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[8] *See* MISS. CODE ANN. § 43-21-105. A child is defined as neglected when his "parent, guardian or custodian or any person responsible for his care or support, neglects or refuses, when able so to do, to provide for him proper and necessary care or support, or education." *Id.*

[9] Comment, *Parent and Child—Child's Right To Sue Parent for Support*, 15 N.C. L. REV. 67 (1936). The same dichotomy exists between cohabiting spouses and separated spouses. Spouses in an intact household cannot sue each other for support, while a separated spouse may seek separate maintenance in recognition of the spousal duty of support. *See* McGuire v. McGuire, 59 N.W.2d 336, 341 (Neb. 1953).

[10] *See* MISS. CODE ANN. § 43-21-113. In addition, parents may be prosecuted for abandonment or neglect under MISS. CODE ANN. § 97-5-3 (stating that any parent who deserts or wilfully neglects or refuses to provide support is guilty of a felony). Prior to 1995 the statute required a showing that the children were left "in destitute and necessitous circumstances." *See* Knowles v. State, 708 So. 2d 549, 551 (Miss 1998); Bryant v. State, 567 So. 2d 234, 235 (Miss 1990). The amendment would appear to allow suit by a custodial parent against a noncustodial parent who willfully refuses to comply with a support order. *See Knowles*, 708 So. 2d at 557 (finding no double jeopardy created by prosecution under statute following contempt proceeding in chancery court).

[11] Rawlings v. Rawlings, 83 So. 146, 146 (Miss. 1919). In *Rawlings*, suit was filed by children against their father, who was living separate and apart from his wife and children. *Id.* Today, a duty of support arises upon separation.

[12] *See infra* notes 101-19 and accompanying text. The spousal duty of support reflects the same state deference within the marriage and close attention and

2. *The Doctrine of Necessaries*

The common law doctrine of necessaries does provide an indirect source of support for children in intact families. The doctrine of necessaries, originally developed to assist a wife in obtaining support for herself and children upon the husband's failure to provide,[13] has been codified in some states to allow creditors to sue parents for the costs of goods or services provided to children.[14] Mississippi has no similar statute. However, in 1995, the supreme court stated that Mississippi does recognize a similar doctrine, which requires parents to pay for their child's reasonable medical expenses.[15] Under this doctrine, parents are jointly and severally liable to third parties for provision of reasonable medical care to their children.[16]

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intervention when the family unit is severed. For example, in *McGuire v. McGuire*, a wife of 33 years sued her husband, with whom she still resided, for support commensurate with his income. 59 N.W.2d 336, 338 (Neb. 1953). The *McGuire* court held that suit for support could be maintained only if the parties had separated: "The living standards of a family are a matter of concern for the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf." *McGuire*, 59 N.W.2d at 341.

[13] In 1993, the Mississippi Supreme Court abolished the husband-wife doctrine of necessaries, holding that a spouse has no obligation for medical bills incurred by the other in the absence of an express agreement to be responsible for the bills. Govan v. Medical Credit Services, Inc., 621 So. 2d 928, 929 (Miss. 1993). *But cf.* MISS. CODE ANN. § 43-31-25: "The father and grandfather, the mother and grandmother, and brothers and sisters, and the descendants of any pauper not able to work, as the board of supervisors shall direct, shall, at their own charge, relieve and maintain such pauper; and, in case of refusal, shall forfeit and pay the county the sum of One Hundred Fifty Dollars ($150.00) per month, for each month they may so refuse, . . . ; and shall be liable to any governmental entity who supplies such poor relative, if abandoned, with necessaries, not exceeding said sum per month."

[14] CAL. CIV. CODE § 207 (West 1982 & Supp. 1990); IOWA CODE ANN. § 675.4 (West 1987 & Supp. 1990). *See also* Harris, *supra* note 3, at 692-708.

[15] McGowan v. West Side Bone & Joint Center, 656 So. 2d 119 (Miss. 1995).

[16] *McGowan*, 656 So. 2d at 122. The parents in *McGowan* were divorced pursuant to a decree which ordered the father to provide medical insurance, which he did, but did not order that he pay out-of-pocket medical expenses, which were the basis for the suit. *Id.* at 122-23. The father argued that the court's decision usurped the power of the chancellor in divorce cases. *Id.* at 123. The court held, however, that the divorce decree was not binding on third parties, that the father was liable to the medical provider, and that his remedy was against his ex-wife

B. After Divorce

State oversight of child support obligations usually arises when parents divorce. By the nineteenth century, courts were faced with more frequent divorces and the troubling question of the source of a noncustodial father's duty to support. In spite of earlier decisions connecting custody and the duty of support, fathers' post-divorce attempts to link support to the right to custody and a child's services were generally rejected. In a 1924 Mississippi case, *Lee v. Lee*, the father argued in response to a suit for support that the "bill states no cause of action against him because under the law since appellee was awarded the custody of their child, . . . , it was her duty to support the child, and not his duty."[17] The court rejected the notion that loss of custody and services justified a refusal to support and held that a father has a common law duty of support when custody is awarded to the mother in a divorce.[18]

Ultimately, legislatures removed any uncertainty about the duty to support by authorizing courts to award support in divorce and separation actions.[19] Section 93-5-23 of the Mississippi Code establishes the chancellor's authority in divorce actions: "When a divorce shall be decreed . . . the court may . . . make all orders touching the care, custody, and maintenance of the children of the marriage."[20] At divorce, the state abandons a hands-off policy and becomes the guardian of the child's right to support with ongoing power to modify and enforce support obligations.[21] Even the custodial parent can-

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in chancery court if he paid bills for which she was liable. *Id. See also* Sheppard Pratt Physicians, P.A. v. Sakwa, 725 So. 2d 755, 758 (Miss. 1998) (applying Maryland law, but recognizing rule in Mississippi).

[17] 130 So. 345, 346 (Miss. 1924).

[18] *Lee*, 130 So. at 34. The court noted that there was some authority to the contrary, but that the weight supported the father's continuing obligation. *Id.*

[19] *See* Harris, *supra* note 2, at 692-708.

[20] MISS. CODE ANN. § 93-5-23. The statute also provides for modification of the decree "as the case may require." *Id.* A similar provision was included in the divorce statute as early as 1857. *See* Garland v. Garland, 50 Miss. 694, 1874 WL 4630, *7, (1874) (citing art. 13 of the Code of 1857).

[21] *See* MISS. CODE ANN. § 93-5-23 (stating that court may, after divorce de-

not waive or contract away the child's right to support.[22]

C. After Separation

Divorce is not a prerequisite for the statutory support obligations. State deference to parental decision-making with regard to financial arrangements ends when an intact family separates into two households. While Mississippi statutes do not provide for legal separation or specifically address separate maintenance actions, the Mississippi Supreme Court has held that an award of separate maintenance and child support is within the inherent jurisdiction of the chancery court. In 1874, the court held that the chancery court may order support for a wife abandoned without fault.[23] An award of separate maintenance is a "judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other."[24] Court decisions have made clear that child support may be awarded to the custodial parent upon separation with or without an award of separate maintenance.[25] In fact, the court has stated that the allowance for separate maintenance should not include an amount

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cree, change decree and make new decrees as case requires).

[22] *See infra* notes 68-74 and accomanying text.

[23] Garland v. Garland, 50 Miss. 694, 715-16, 1874 WL 4630, *13 (1874).

[24] Kennedy v. Kennedy, 650 So. 2d 1362, 1367 (Miss. 1995). In *Robinson v. Robinson*, the court refused to address a husband's equal protection challenge to separate maintenance, which is provided to the wife alone. 554 So. 2d 300, 306 (Miss. 1990). The court acknowledged the issue, but stated that the question was not before the court. *Robinson*, 554 So. 2d at 306. Although separate maintenance is meant to encourage the husband to return, a chancellor cannot enter an order compelling reunion. In *Wilbourne v. Wilbourne*, the Court held that the chancellor erred in enjoining the husband from living with his girlfriend and ordering him to return to his wife. 748 So. 2d 184 (Miss 1999). The court noted that an order of separate maintenance is a command to the husband to resume the marriage *or* support his wife. *Wilbourne*, 748 So. 2d at 188.

[25] *See Robinson*, 554 So. 2d at 304-05 (reversing chancellor's award of separate maintenance to the wife, who was found to have substantially contributed to the breakup of the marriage, but permitting award of child support); Boyett v. Boyett, 119 So. 299, 300 (Miss. 1928) (distinguishing the facts from *Rawlings*, *supra* note 11, on the grounds that the suit was by the mother for support of the children and not a separate suit of the children).

for support of the children, which should be set out as a separate and distinct obligation.[26] Furthermore, if the spouse seeking separate maintenance is the noncustodial spouse, he or she may still be required to provide child support to the custodial spouse.[27] In separate maintenance actions, support is to be determined by use of the statutory guidelines as in divorce actions.[28]

D. Upon Annulment

Court oversight of support obligations applies to children of annulled marriages as well as children of divorce. An annulment is a declaration that the marriage is void; thus, no alimony is available, and property acquired by the parties is not subject to equitable distribution. However, children of the marriage are legitimate unless the marriage was incestuous.[29] The Mississippi annulment statutes provide that a chancellor hearing an annulment action may "make all orders touching the care, custody, and maintenance of the children of the marriage" and may modify the judgment as necessary.[30] In a 1936 case, the court held that the mother's failure to request child support in an annulment hearing did not release or exonerate the father from support which, as a matter of public policy, could not be waived.[31]

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[26] *Robinson*, 554 So. 2d at 305. Because the chancellor had ordered combined separate maintenance and child support without designating specific amounts for each the case was remanded for a determination of the proper amount of child support. *Id.* at 306.

[27] Steen v. Steen, 641 So. 2d 1167, 1171 (Miss. 1994). In *Steen*, the husband who did not a want divorce was granted a form of separate maintenance. The case was remanded to determine what child support he should pay to his wife who had custody. *Steen*, 641 So. 2d at 1171.

[28] Stanford v. Stanford, 734 So. 2d 359, 362 (Miss. 1999).

[29] MISS. CODE ANN. § 93-7-5.

[30] MISS. CODE ANN. § 93-7-7.

[31] Bass v. Irvin, 170 So. 673, 675 (Miss 1936).

E. Children Born Out of Wedlock

The Elizabethan poor laws established the predecessor of paternity statutes, the bastardy proceeding, which was used to enforce a father's support obligation to the parish for children born outside marriage. At least as early as 1906, fathers of illegitimate children were required to support their children in Mississippi.[32] Today, section 93-9-7 of the Mississippi Uniform Paternity Act provides that the father of a child born out of wedlock "is liable to the same extent as the father of a child born of lawful matrimony, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement, and for the education, necessary support and maintenance, and medical and funeral expenses of the child."[33] The Act also provides for the same continuing jurisdiction to modify and enforce support orders as in the case of divorce.[34] The obligation is not identical to a married father's duty of support, however. The mother of the child, with court approval, may enter into a lump sum settlement with the child's alleged father. In *Atwood v. Hicks*, the mother of a child born out of wedlock brought a second suit against the ten-year-old child's alleged father for a declaration of paternity and support.[35] The father defended the action on the basis of a court approved $18,000 settlement of the mother's 1977 paternity action against him.[36] On behalf of the child, the mother referred to well established law that a child's right to support may not be compromised by the parents. The court held that the agreement was enforceable, in light of statutory authority permitting guardians to compromise doubtful claims of wards,[37] and section 93-9-49 of the paternity statute authorizing court approved settlements in paternity actions.[38] The court did note, however, that the settlement could be attacked on the basis of fraud or collusion.[39]

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[32] Section 268, Code of 1906 (Hemingway's Code, § 217), required the father to provide support "[w]hen any single woman shall be delivered of a bastard," *cited in* Crum v. Brock, 101 So. 704, 705 (Miss. 1924) (holding that widow was "single woman" for purposes of statute).

[33] MISS. CODE ANN. § 93-9-7.

[34] MISS. CODE ANN. § 93-9-15. "The court has continuing jurisdiction to modify or revoke an order and to increase or decrease amounts fixed by order for future education and necessary support and maintenance." *Id.*

[35] 538 So. 2d 404, 406 (Miss. 1989).

[36] *Atwood*, 538 So. 2d at 406. The settlement provided $7800 to the mother for birth expenses and support to date, $7200 to her attorney, and $3000 in the guardianship estate. *Id.*

III. PERSONS RESPONSIBLE FOR SUPPORT

A. *Support Obligation Between Parents*

Until recently, child support was considered an obligation of the father, while the mother was considered at most secondarily liable.[40] In *Orr v. Orr*, the United States Supreme Court invalidated gender-based distinctions for provision of alimony as violative of equal protection.[41] The Court held that differences based on gender could not be justified by preference for a family structure in which the wife plays a dependent role, on the basis that the statute provides help for needy spouses, or to compensate women for past discrimination during marriage.[42] Most state statutes now provide for equal parental responsibility for financial support of children.[43] Section 93-13-1 of the Mississippi Code provides that "father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education."[44] Citing this obligation, the Mississippi court has held that it is error for a chancellor to fail to award a custodial father child support from a noncustodial mother. Recently, in response to a noncustodial mother's attempt to reduce child support, the court stated,

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[37] *See* MISS. CODE ANN. § 93-13-59.

[38] *Atwood*, 538 So. 2d at 407 (citing MISS. CODE ANN. § 93-9-49).

[39] *Id.* at 408. The court held in *Mississippi Dep't of Human Serv. v. Barnett*, that a chancellor erred in failing to include DHS in the settlement negotiation of a paternity case involving a recipient of AFDC. 633 So. 2d 430, 436 (Miss. 1993). As an AFDC recipient, the mother assigned to DHS any rights of the child against the noncustodial parent for support. *Id. See* MISS. CODE ANN. § 43-19-35. Under those circumstances, the court held that DHS should have been allowed to intervene and participate in the settlement and that the settlement was ineffective without their participation. *Barnett*, 633 So. 2d at 437.

[40] *See* Bass v. Irvin, 170 So. 673, 674 (Miss. 1936) ("father of this child . . . is primarily liable for its support, the mother being liable secondarily."). The Court took this position as recently as 1960, in *Pass v. Pass*, stating that the father is primarily charged with providing educational support. 118 So. 2d 769, 772 (Miss. 1960).

[41] 440 U.S. 268 (1979).

[42] *Orr*, 440 U.S. at 280-82.

[43] H. CLARK, *supra* note 1, § 17.1, at 710. The Mississippi legislature, in response to *Orr*, amended the divorce statute regarding alimony effective July 1, 1985. *See* MISS. CODE ANN. § 93-5-23.

> When a married couple decides that the mother should stay home to raise their children, the decision is made jointly. The father's resulting increased financial burden is agreed upon. In the case of a divorced couple, however, the ex-spouse has no input. It is inequitable for a woman to quit her job by choice and expect her ex-husband to pick up the slack when he had no vote in the matter. "[M]ales and females cannot be treated differently for child-support purposes consistently with the Equal Protection Clause of the United States Constitution."[45]

B. Liability of Stepparents

1. During the Marriage

Stepparents have no common law duty to support their stepchildren as a result of their marriage. However, some courts have found a duty to support where the stepparent is deemed to be *in loco parentis* with the child. In addition, some states have created statutory stepparent support obligations.[46]

2. After Divorce

The support duty, whether *in loco parentis* or statutory, generally does not survive the obligor's divorce from the child's parent.[47] However, a few cases have applied the doctrine of equitable estoppel to require support from a divorced stepparent.[48] For example, a stepparent duty to support was found where the child sincerely believed that the stepfather was his father and the stepfather represented himself to the child as his father.[49] In other cases, support duties have been imposed on stepparents on the basis of implied or express contract. Most of these cases involve a stepfather's express promise to care for the children and their mother's agreement to marry in reliance on the promise.[50] In *Logan v. Logan*, the Mississippi Supreme Court mentioned in dicta that stepparents may be held liable for child support where the stepparent has agreed to support the children or has done so over a period of time so that the mother and children rely on the support to their detriment.[51]

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[44] MISS. CODE ANN. § 93-13-1.

[45] Bailey v. Bailey, 724 So. 2d 335, 338 (Miss. 1998).

[46] MO. ANN. STAT. § 453.400.1. *See also* OR. REV. STAT. § 109.053 (stating family expense statute includes stepparents); WASH. REV. CODE ANN. § 26.20.030 (same).

[47] Zeller v. Zeller, 407 P.2d 478, 482 (Kan. 1965).

IV. DURATION OF THE SUPPORT OBLIGATION

The duty to support one's children ends when the child reaches the age of majority. However, courts will enforce a parent's agreement to extend support beyond majority. In addition, support beyond majority may be required for disabled children. Support obligations may be terminated prior to majority if the child becomes emancipated—freed from parental control and authority—or, in extreme cases, where an older child refuses to maintain a relationship with the payor.

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[48] Miller v. Miller, 478 A.2d 351, 354 (N.J. 1984) (holding that continuing duty may arise from conduct relied on by the mother); Eckhardt v. Eckhardt, 323 N.Y.S.2d 611, 612 (N.J. 1971) (holding that any duty to stepchild ends at divorce).

[49] Ross v. Ross, 314 A.2d 623, 626 (N.J. Juv. Ct. 1973).

[50] *See* L. v. L., 497 S.W.2d 840, 842 (Mo. 1973) (finding estoppel requirements met where wife married husband based partly upon promise of support for children); T. v. T., 224 S.E.2d 148, 151 (Va. 1976) (finding mother moved to another state and married on promise of support for children).

[51] 730 So. 2d 1124, 1126 (Miss. 1998). The court cited *Tedford v. Dempsey*, 437 So. 2d 410, 421 n. 10 (Miss. 1983) (also mentioning in dicta that stepparent could be liable for support).

A. The Age of Majority

Although twenty-one is the common law age of majority, most states provide by statute that majority is reached at eighteen. As a result, parental support obligations in most states end at eighteen.[52] In contrast, the Mississippi Code provides that emancipation occurs when a child reaches the age of twenty-one.[53] A court may not order basic child support extending past twenty-one.[54] Nor may a court order that a parent provide add-ons to child support, such as life and health insurance, or payment of college expenses beyond majority.[55]

B. Emancipation

Section 93-11-65 of the Mississippi Code provides that parental support duties terminate upon emancipation. The statute sets out four instances in which a court may find that emancipation has occurred: (1) when the child is twenty-one, (2) when the child marries, (3) when the child "[d]iscontinues full-time enrollment in school and obtains full-time employment" prior to twenty-one, or (4) when the child "[v]oluntarily moves from the home of the custodial parent or guardian and establishes independent living arrangements and obtains full-time employment" prior to twenty-one.[56] In two recent decisions, the Mississippi Supreme Court established that (1) the four instances of emancipation listed in the statute are not exclusive and (2) proof that one of the four listed circumstances exists does not guarantee a finding of emancipation.

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[52] Rutkin, *supra* note 2, § 33.10[1], at 33-78 to 33-79.

[53] MISS. CODE ANN. § 93-11-65(8). The provisions codified the court's ruling in Nichols v. Tedder 547 So. 2d 766, 770 (Miss. 1989). The court in that case confirmed that for purposes of child support, twenty-one is the age of majority. *Nichols*, 547 So. 2d at 770. Prior to *Nichols*, "it [was] common knowledge that . . . the bench and bar have applied the term "children" to offspring who are less than twenty-one." Watkins v. Watkins, 337 So. 2d 723, 724 (Miss. 1976).

[54] *Nichols*, 547 So. 2d at 770. *See* Deborah H. Bell, *Child Support Orders: The Federal-State Partnership*, 69 MISS. L. J. 597, 628 (2000) (distinguishing "basic" child support and "add-ons").

[55] *See* Stokes v. Maris, 596 So. 2d 879, 882 (Miss. 1992) (stating that court may not order support in any form, including college support, after majority).

[56] MISS. CODE ANN. § 93-11-65.

In *Rennie v. Rennie*, the court found a child emancipated when she had a child of her own, moved out of her mother's house to live with the father of her child, obtained part-time employment, and established her own household.[57] The facts did not exactly fit any of the statutory descriptions of emancipation. Heather was not twenty-one, was not married, and did not obtain full-time employment.[58] The court held that the statutory listing added to, rather than limited, the prior judicial definition of emancipation:

> [W]e defined emancipation prior to the enactment of the correct statutory language as follows: Emancipation, . . . , means the freeing of a child for all the period of its minority from the care, custody, control, and service of its parents; the relinquishment of parental control, conferring on the child the right to its own earnings and terminating the parent's legal obligation to support it.[59]

The court also held that once emancipation occurs child support is permanently terminated and is not renewed if the child moves back home prior to majority.[60]

In *Andrews v. Williams*, the court of appeals made clear that, in addition to meeting the technical requirements of the emancipation statute, a minor must be freed from the "care, custody, control and service of its parents" for emancipation to occur.[61] Mr. Andrews argued that his eighteen-year-old son, who lived with his mother and was employed full time, was emancipated under the third provision of the statute.[62] The court agreed that Jeff met the technical requirements of the statute, but found that he was unable to support himself independently on $185 a week and did not meet the judicial definition of emancipation.[63]

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[57] 718 So. 2d 1091, 1094 (Miss. 1998).

[58] *Rennie*, 718 So. 2d at 1092-93.

[59] *Id.* at 1093 (citing Caldwell v. Caldwell, 579 So. 2d 543, 549 (Miss. 1991)).

[60] *Id.* at 1093 (stating that child "may not now revoke her irresponsible launch into adulthood").

[61] 723 So. 2d 1175, 1179 (Miss. Ct. App. 1998).

[62] *Andrews*, 723 So. 2d at 1179.

C. Parental Agreement To Terminate Support Prior to Majority

Parents may not agree to curtail the duty of support prior to majority. In *Lawrence* v. *Lawrence*, parents agreed in a divorce settlement that child support would end when the children reached eighteen.[64] The court held that child support is a vested right of the child held by the recipient parent as a fiduciary; therefore, a parental agreement contracting away support prior to majority is not enforceable.[65] Similarly, in *Calton v. Calton*, the parents executed a post-divorce agreement in which the wife agreed not to sue for court-ordered child support of $120 a month in return for a conveyance of land.[66] One year later she sued for back support.[67] The court held that the covenant not to sue was not enforceable as a matter of public policy: "[A] child support judgment is awarded to the custodial parent for the benefit and protection of the child, the underlying principle being the legal duty owed to the child for the child's maintenance and best interest. There is a fiduciary relationship owed to the child by the custodial parent."[68]

D. Termination Based Upon Interference with Visitation

Noncustodial parents have sought to terminate support payments when the custodial parent refuses or interferes with visitation. Courts generally hold that visitation and child support are separate and distinct. Nonpayment of child support will not justify refusal of visitation rights, and refusal of visitation is not a justification for withholding support.[69] However, a few courts have allowed a downward deviation in the amount of support or suspension in support based upon refusal of visitation.[70] In extreme cases, courts have terminated support obligations and even excused arrearages where the custodial parent has hidden the child for a long period of time.[71] In *Cole v. Hood*, the Mississippi Supreme Court refused to award past due child support to a mother who had hidden the children from their father for eight years without revealing their location.[72] Relying on the maxim that she who comes into equity must come with clean hands, the court held that she had waived her right of child support.[73] The court refused to adopt this approach in a less outrageous case, where the father knew generally where the child was and could have taken steps to reduce his obligation or to enforce visitation rights.[74]

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[63] *Id.*

[64] 574 So. 2d 1376, 1378 (Miss. 1991).

[65] *Lawrence*, 574 So. 2d at 1381.

[66] 485 So. 2d 309, 310 (Miss. 1986).

[67] *Calton*, 485 So. 2d at 310.

[68] *Id.* (citations omitted).

[69] *See* Clowdis v. Earnest, 629 So. 2d 1044, 1046 (Fla. Dist. Ct. App. 1993) (stating denial of visitation rights does not warrant reduction in court-ordered support); *In re* Welfare of J.D.N., 504 N.W.2d 54, 58 (Minn. Ct. App. 1993) (hold-

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ing failure to allow visitation cannot be factor in termining or modifying support); Westgate v. Westgate, 887 P.2d 737, 789 (Nev. 1994) (holding failure to comply with terms of visitation agreement cannot be used as reason to reduce child support obligation); Sharpe v. Sharpe, 902 P.2d 210, 216 (Wyo. 1995) (holding no deviation from guidelines based on denial of visitation).

[70] *See* Schaffer v. Haynes, 847 S.W.2d 814, 819 (Mo. Ct. App. 1992) (holding lower court did not err in abating support payment); Welch v. Welch, 519 N.W.2d 262, 271 (Neb. 1994) (stating court may suspend child support where custodial parent deprives noncustodial parent of visitation); Hiross v. Hiross, 639 N.Y.S.2d 70, 71 (N.Y. App. Div. 1996) (stating custodial parent's deliberate frustration of visitation rights can warrant suspension).

[71] *See In re* Marriage of Damico, 872 P.2d 126, 129-30 (Cal. 1994) (allowing non-custodial parent to claim active concealment of child as defense to collection of child support arrearages); *In re* Loomis, 587 N.W.2d 427, 430 (S.D. 1998) (holding father did not have to pay retroactive support).

[72] 371 So. 2d 861, 864 (Miss. 1979).

[73] *Cole*, 371 So. 2d at 864.

[74] Cunliffe v. Swarzfager, 437 So. 2d 43, 45-46 (Miss. 1983). The father did not see his son for five years while he lived with his mother in Brazil. *Cunliffe*, 437 So. 2d at 44. However, the court found that the father knew generally where his ex-wife lived, even if he did not know her exact address; that he knew where to contact her relatives; and that he received telephone calls from his son. *Id.* at 45. Under these circumstances, "the appellee could have taken proper steps to relieve himself from the support payments. The court probably would have directed him what, if anything, should be done toward discontinuing the support payments." *Id.*

E. Termination Based Upon Child's Hostility

Courts usually reject payors' attempts to terminate or reduce child support as a result of a child's hostility to the parent or refusal to visit the parent.[75] In *Caldwell v. Caldwell*,[76] the Mississippi Supreme Court rejected a father's argument that his support obligation should be modified because of his fifteen year old's hostility to him.[77] The court held that the duty of support is not based upon the amount of love shown by a child and that it would require extreme circumstances to terminate support for a child this age.[78] On the other hand, the court found circumstances warranting termination in *Hambrick v. Prestwood.*[79] There the court relieved a father of the duty to support his nineteen-year-old daughter through college where the daughter, without a show of reason, refused to visit him for six years and said she hated him.[80]

F. Adoption and Termination of Parental Rights

A parent's support obligation ceases when parental rights are terminated either by consent or as a result of a termination action.[81] Similarly, the adoption of a child terminates all parental rights and duties with respect to the child.[82] However, the Mississippi Supreme Court has recognized an agreement continuing support obligations after an adoption. In *Humphrey v. Pannell*, the court upheld an agreement between the biological father and adopting grandparents, recognizing the validity of the adoption but acknowledging that Humphrey was the biological father, granting him visitation rights and providing that he would pay child support.[83]

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[75] *See* Heath v. Heath, 647 So. 2d 769, 771 (Ala. Civ. App. 1994) (holding strained relationship did not relieve father of duty to pay); Parker v. Parker, 610 So. 2d 719, 720 (Fla Dist. Ct. App. 1992) (affirming child support award where child was grossly disrespectful toward father); O'Connell v. O'Connell, 597 A.2d 643, 645 (Pa. 1991) (holding daughter's willful estrangement from her father did not relieve him of obligation to pay support).

[76] 579 So. 2d 543 (Miss. 1991).

[77] *Caldwell*, 579 So. 2d at 548.

[78] *Id.*

[79] 382 So. 2d 474 (Miss. 1980).

[80] *Hambrick*, 382 So. 2d at 477. Evidence also showed that the daughter earned $460 a month and would not be destitute without her father's support. *Id.*

[81] Grounds for termination of parental rights are set out in section 93-15-103(3) of the Mississippi Code. Parental rights may also be terminated by agreement. MISS. CODE ANN. § 93-15-103(2) (Supp. 1999).

[82] MISS. CODE ANN. § 93-17-13 (Supp. 1999) (providing that "all parental rights of the natural parent, or parents, shall be terminated, [upon adoption] except as to a natural parent who is the spouse of the adopting parent").

G. Termination Upon Parent's Death

A parent's duty to support a child ends at the parent's death. A deceased parent's estate is liable for support payments due and owing at the time of death, but not for continuing support payments in the absence of an express agreement to that effect.[84] The Mississippi Supreme Court first considered the issue in 1957 in *Mahaffey v. First National Bank*, holding that "the better rule is that the liability of the father to support his child does not survive his death in the absence of a contract or agreement imposing such liability."[85] Subsequent decisions indicate that a duty to support beyond death must be explicit and will not be lightly implied from an agreement. In *Lewis v. Lewis*, the court held that an agreement for support until each child reached twenty-one, married, died, or was no longer under the mother's supervision did not by implication extend beyond the payor's death.[86] In *Smith v. Smith*, the court held that assignment of ten-year notes as security for child support did not mean the father's estate was liable for support if he died within ten years; the notes were simply security for the father's child support obligation, which ceased at his death.[87]

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[83] 710 So. 2d 392, 393-94 (Miss. 1998). The child's grandparents adopted her in 1987 with the consent of the mother and the mother's husband, who was not the child's father. *Humphrey*, 710 So. 2d at 393-94. The court below was not informed of this fact. *Id.* at 393. When the biological father challenged the adoption several years later, the case was resolved by an agreement that the father would be recognized as the biological father, would have visitation rights, and would pay child support. *Id.* at 393-94. The court held that the "unless otherwise specifically provided," language of section 93-17-13 allowed the natural and adoptive parents flexibility to make such an arrangement. *Id.* at 400.

[84] Smith v. Smith, 349 So. 2d 529, 531 (Miss. 1977).

[85] 97 So. 2d 756, 767 (Miss. 1957).

[86] 125 So. 2d 286, 288 (Miss. 1960). The court's refusal to imply an agreement to support after death is in contrast with its willingness to imply an agreement to support beyond majority. *See infra* notes 107-13 and accompanying text.

H. Termination Upon Parents' Remarriage

When the parents of a child from whom support has been ordered remarry each other, child support automatically terminates; however, support does not terminate if the parents cohabit without marrying.[88] If the child support obligor provides direct support for the child during cohabitation, the support obligation should be offset by the amount of support provided directly.[89]

I. Support Beyond Majority

1. Agreement To Extend Support

Although parents may not contract away their children's right to support prior to majority, parents may voluntarily assume an obligation for post-majority support either through an agreement incorporated into a divorce decree or a separate contract.[90] An agreement to support post-majority most often arises in connection with an agreement to provide for a college education.

2. Post-Majority College Support

The Mississippi Supreme Court held in 1960 that a parent's duty of support may include providing a college education if the child is qualified for a college education and the obligor is financially able to provide one.[91] Support for college, like basic child support, does not extend past majority in the absence of an express agreement.[92] However, parents may voluntarily assume an obligation for post-majority college support either through an agreement incorporated into a divorce decree[93] or a separate contract[94] or through an agreed modification.[95]

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[87] 349 So. 2d 529, 531 (Miss. 1997).

[88] Rutkin, *supra* note 2, § 52.04 [1], at 52-76.

[89] The court has held that a payor should seek modification rather than unilaterally discontinuing payments and making direct expenditures. However, the court will reduce an arrearage if proof of direct expenditures is provided. *See* Varner v. Varner, 588 So. 2d 428, 435 (Miss. 1991) (allowing credit where father provided direct support for children who came to live with him).

[90] Nichols v. Tedder, 547 So. 2d 766, 770 (Miss. 1989).

[91] Pass v. Pass, 118 So. 2d 769, 773 (Miss. 1960). The court held that its ruling was justified by the importance of a college education and the parent's

a. Implied Agreements for Support

While the court has required an explicit agreement to extend support beyond a payor's death, it has found agreements for post-majority college support implied in rather vague language. In *Crow v. Crow*, the court found an obligation for post-majority college support stemming from an agreed order to pay "all reasonable college expenses."[96] In *Rogers v. Rogers*, the court held that an agreement by the father to support his child "while in college" required support beyond the age of twenty-one.[97] In a similar case, the parties agreed to a modification, which provided that the father would be responsible for college expenses "of the minor children."[98] Similarly, the court found an agreement to provide post-majority college support in a provision for "all educational expenses of [the children]."[99]

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obligation to the state as well as the child for "a well-equipped, a well-trained, and well-educated citizenship." *Pass*, 118 So. 2d at 773.

[92] Stokes v. Maris, 596 So. 2d 879, 882 (Miss. 1992) (stating trial court "ha[s] no authority to order child support in any form, whether regular, college expenses, or otherwise, to continue in effect post majority"); *see* Crow v. Crow, 622 So. 2d 1226, 1230 (Miss. 1993) (relieving parent of legal duty to support child once child is emancipated whether by attaining the age of majority or otherwise).

[93] *See Crow*, 622 So. 2d at 1227.

[94] Nichols v. Tedder, 547 So. 2d 766, 770 (Miss. 1989).

[95] Boleware v. Boleware, 450 So. 2d 92, 93 (Miss. 1984).

[96] 622 So. 2d 1226, 1227 (Miss. 1993).

[97] 662 So. 2d 1111 (Miss. 1995).

[98] Boleware v. Boleware, 450 So. 2d 92, 92 (Miss. 1984).

[99] Mottley v. Mottley, 729 So. 2d 1289, 1290 (Miss. 1999).

b. Scope of Post-Majority Support

While the premajority obligation to support a child in college includes living expenses,[100] the scope of post-majority support is more limited. In *Meek v. Warren*, the court held that post-majority college support includes only tuition, room, board, fees, and educational essentials such as a computer unless the agreement explicitly provided otherwise.[101] If the agreement for post-majority support does not specify how long the support will continue, the court will order that support continue for a reasonable time. In *Rogers v. Rogers*, the court held that six years of college was reasonable since the child worked and went to school part-time.[102] Noting that the agreement was "extremely vague," the court encouraged attorneys to include specific provisions stating maximum support periods and academic performance requirements.[103]

3. Support for Adult Disabled Children

A number of courts have held that parents have a duty to support a disabled child after majority.[104] Mississippi has not yet imposed the duty on all parents, but has legislatively required unwed fathers to support adult disabled children. In 1925, the Mississippi Supreme Court stated in dicta, "under the common law there is no legal obligation . . . upon the parent to support his adult child."[105] In recent years, however, the court has indicated in several cases that it would be receptive to a claim for support in a proper case. In *Watkins v. Watkins*, for example, a father was sued for contempt because he discontinued support of his adult retarded son at age twenty-one.[106] The court recognized decisions in other states imposing a parental duty to support adult disabled children, but held that a contempt proceeding under a child support decree was not the appropriate vehicle to address such a duty.[107] The court recently suggested the possibility of support for adult disabled children in dicta in a child support case. In *Arthur v. Arthur*, the court noted that a father could be required to maintain insurance only until his child reached majority, and not thereafter, "[i]n the absence of other compelling reasons, such as the mental or physical incapacitation of the child."[108] The legislature has, however, imposed a statutory duty on fathers against whom the Department of Human Services obtains an order of paternity and child support. A support award obtained through this procedure continues "in the case of a child who, upon reaching the age of twenty-one (21) years, is mentally or physically incapable of self-support . . . unless said child is a long-term patient in a facility owned or operated by the State of Mississippi."[109]

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[100] The court recently elaborated on the scope of the duty to provide a college education in *Saliba v. Saliba*. No. 1998-CA-01311-SCT, 2000 WL 216202 (Miss. Feb. 24, 2000). The court held that the duty to provide a college education is not necessarily limited to in state tuition, but that given the child's ability and the parent's means, out of state tuition may be ordered. *Saliba*, 2000 WL 216202, at *8. Furthermore, "[i]n the present case, both parents are very wealthy and sorority expenses should not have any significant negative impact on their net worth." *Id.* Thus, college expenses could include sorority dues and other expenses. *Id.* at *9.

[101] 726 So. 2d 1292, 1294 (Miss. Ct. App. 1998). An agreement expanding post-majority support beyond this was found in *Rogers v. Rogers*, where the father agreed to pay "$600 per month for the support [of the children] and all reasonable college expenses" and to pay hazard insurance and property taxes on the home and automobile insurance and tags while the children were in college. 662 So. 2d 1111 (Miss. 1995). The court upheld the chancellor's reading of this provision to extend the $600 child support post-majority while the children were in college. *Id.* at 1115-16.

[102] 662 So. 2d 1111, 1115 (Miss. 1995).

[103] *Rogers*, 662 So. 2d at 1115.

[104] *See* Streb v. Streb, 774 P.2d 798, 800 (Alaska 1989) (stating presumption of emancipation upon attaining majority may be overcome by evidence that adult child is incapable of supporting himself due to physical or mental incapacity);

Monitzer v. Monitzer, 600 So. 2d 575, 575-76 (Fla. Dist. Ct. App. 1992) (finding substantial evidence existed that child over age eighteen was dependent due to continued physical or mental incapacity); McCauley v. McCauley, 599 So. 2d 1002, 1003 (Fla. Dist. Ct. App. 1992) (holding duty to pay support ceases when child attains age of majority absent evidence that child suffers from physical or mental incapacities).

[105] Wright v. Coleman, 102 So. 774, 777 (Miss. 1925).

[106] 337 So. 2d 723, 724 (Miss. 1976).

[107] *Watkins*, 337 So. 2d at 724-25.

[108] 691 So. 2d 997, 1001 (Miss. 1997).

[109] MISS. CODE ANN. § 43-19-33(3). The statute also provides that the judgment of paternity is res judicata as to the issue of post-majority support. *Id.*

V. MODIFICATION OF SUPPORT AWARDS

The previous sections describe the common law rules for the basic support obligation—who may be ordered to provide support, which children are entitled to support, and how long the obligation lasts. Within this common law framework, federally mandated state guidelines are used to determine the exact amount of a particular child support award. Once an initial award is established modification may be requested by one of the parties. Modification in Mississippi is primarily governed by state common law principles, but is impacted to some extent by federal child support mandates.

Child support orders typically require payment of a fixed amount on a monthly basis. They generally do not provide for periodic increases in the amount of support, nor do they provide for reduction in payment under certain circumstances. For a number of reasons, the original support order may need adjustment before the child reaches adulthood. Requests to increase child support are typically based upon the increased costs of raising older children, the diminishing value of the original award because of inflation, an increase in the noncustodial parent's income, or a decrease in the custodial parent's income. On the other hand, noncustodial parents frequently seek a reduction in support because of a loss of employment, drop in income, or increase in expenses. In addition, the original child support award may no longer fit the actual custodial arrangment if parents have substantially deviated from the divorce decree's custody and visitation provisions.

In order to modify the original order, the parent seeking an adjustment must file a modification action in the court that issued the original order.[110] Prior to enactment of child support guidelines states required that a party seeking modification prove a substantial change in circumstances since the original order.[111] After enactment of the guidelines, most states continue to recognize change in circumstances as a basis for modification, but also provide by statute for modification if the original order differs substantially from a current application of the guidelines. The section below discusses the common law standard for modification, the efforts of other states to integrate child support guidelines into modification standards, and the intersection of the common law standard and guidelines in Mississippi.

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[110] Section 93-5-23 of the Mississippi Code provides that a court issuing a divorce decree "may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require"; the court has power to modify an agreed order of child support incorporated into a decree as well as a court order of support. In *Lawrence v. Lawrence*, the court held that the effective date of modification is the date of the petition or, thereafter, in the chancellor's discretion. 574 So. 2d 1376, 1384 (Miss. 1991).

A. The Common Law Standard for Modification

The threshold test for modification in most states is a showing of a substantial change in circumstances since the award of child support.[112] A few states add that the substantial change must make the original award unfair or unconscionable.[113] Others require that the change must not have been forseeable at the time of the initial award.[114]

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[111] This flexible standard, which required a review of the finances and needs of the parties, was in keeping with the fact-based approach to establishing the initial award of support. Prior to enactment of the guidelines courts looked to the needs, income, and resources of the mother, father, and child. *See* Bell, *supra* note 58, at 607-08.

[112] *See* GA. CODE ANN. § 19-6-15; MINN. STAT. ANN. § 518.64(2); MO. STAT. ANN. § 452.370(2). *See also* Parker v. Firestone, 568 So. 2d 824, 825 (Ala. Civ. App. 1990) (stating factors to be considered when determining whether there are changed circumstances include needs of child and ability of parent to respond to child's needs); Elsome v. Elsome, 601 N.W.2d 537, 543 (Neb. 1999) (holding that party seeking to modify child support order must show material change of circumstances that occurred subsequent to entry of original decree or previous modification was not contemplated when the prior order was entered); Italiano v. Rudkin, 683 A.2d 854, 855-56 (N.J. Super. Ct. App. Div. 1996) (stating changed circumstances may include an increase in the cost of living, change in contributing spouse's income, subsequent illness or disability, non-contributing spouse's loss of a house or apartment, non-contributing spouse's cohabitation with another, subsequent employment of non-contributing spouse, changes in federal income tax law, and maturation of children). *See, e.g.,* Evans v. Evans, 644 A.2d 1317 (Conn. App. Ct. 1994); King v. King, 598 N.Y.S.2d 278 (App. Div. 1993); Reece v. Reece, 470 So. 2d 148 (Va. Ct. App. 1996).

[113] *See* COLO. REV. STAT. § 14-10-122(1)(a); Morrill v. Millard, 570 A.2d 387, 389-90 (N.H. 1990).

To obtain a modification in child support payments in Mississippi the petitioner must show: (1) a substantial and material change in the circumstances of the mother, father, or child since the original decree was entered[115] and (2) that the change could not have been anticipated by the parties when the chancellor entered the original decree.[116] The following sections illustrate the Mississippi Supreme Court's application of the modification test to specific requests to increase or decrease a support award.

B. Actions To Increase Support Awards Under Common Law

Three factors repeatedly appear as substantial changes supporting an upward modification under the common law standard: an increase in the noncustodial parent's income, inflation, and the increased costs of raising older children. Not surprisingly, all three factors are usually present.[117]

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[114] *See, e.g., In re* Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991).

[115] Gillespie v. Gillespie, 594 So. 2d 620, 623 (Miss. 1992); McEwen v. McEwen, 631 So. 2d 821 (Miss. 1994). The court explained the reason for the requirement of a substantial change in *Tedford v. Dempsey*:

> Matters once finally adjudicated should not be subject to relitigation. . . . It is a rare case where both parents fail to feel a financial pinch. Allowing renewed litigation whenever one begins to feel that pinch would hardly be practicable. Conservation of judicial resources and the desire to hold to a tolerable minimum disruptions in post-divorce domestic tranquility have thus given rise to the rule that there may be no modification in a child support decree absent a substantial or material change in the circumstances of one or more of the interested parties.

437 So. 2d 410, 417 (Miss. 1983)

[116] Tingle v. Tingle, 573 So. 2d 1389, 1391 (Miss. 1990). The court held that modification was not appropriate based upon a loss of severance pay since the obligor was aware at the time of the decree that the pay would terminate soon. *Tingle*, 573 So. 2d at 1391.

[117] Children will invariably be older and usually more expensive, inflation has generally occurred, and in most instances, the noncustodial parent's income increased.

1. *Increase in Payor's Income*

The Mississippi Supreme Court has stated that "[a] substantial increase in the father's resources may also constitute a material change undergirding an upward modification of child support."[118] Slight changes in income or expenses do not constitute a material change in circumstances.[119] Under the common law standard, courts approving modification based upon increased income usually also find that the child's needs have increased[120] or that the child's needs were not adequately met by the original award.[121] For example, in *Wright v. Stanley*, the court upheld a chancellor's $120 a month increase in child support for three children based upon (1) the obligor's substantial increase in income, (2) increase in the cost of living, and (3) increase in the cost of maintaining older children.[122] In contrast, in *Hammett v. Woods*, the court refused an upward modification from $300 a month, even though the father's increased income would support an award under the guidelines of $583 a month.[123] The court found that the needs of the child were completely met since he was supported by state and federal funds available to disabled persons.[124] Thus, under the common law standard, proving an increase in the payor's income alone may not be sufficient to constitute a material change in circumstances.[125]

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[118] Tedford v. Dempsey, 437 So. 2d 410, 418 (Miss. 1983) (finding father's income doubled from time of original decree) (citing Bracey v. Bracey, 408 So. 2d 1387, 1389 (Miss. 1982)).

[119] Keller v. Keller, 230 So. 2d 808, 809-10 (Miss. 1970). *Keller* deals with modification of alimony, which is also governed by the substantial change in circumstances test. *Id.*

[120] *See In re* Sharp, 382 N.E.2d 1279, 1283 (Ill. App. Ct. 1978) (holding that increase in child's needs as well as increase in contributing parent's income are considerations when granting child support modification); *In re* Marriage of Burroughs, 691 S.W.2d 470, 475 (Mo. Ct. App. 1985) (stating inflationary trends and increased needs of growing child are valid reasons for modification if it is demonstrated that these conditions render existing order unreasonable); Lane v. Lane, 483 P.2d 644, 645 (Wash. Ct. App. 1971) (holding evidence of father's substantially increased income and increased costs for needs of children sustained order modifying child support obligations); Manners v. Manners, 706 P.2d 671, 675 (Wyo. 1985) (holding income of parents as well as increased needs of child are considerations for modification of child support).

[121] *See In re* Marriage of Bussey, 483 N.E.2d 1229, 1234 (Ill. 1985).

[122] 700 So. 2d 274, 283 (Miss. 1997).

[123] 602 So. 2d 825, 828 (Miss. 1992).

[124] *Hammett*, 602 So. 2d at 828.

2. *Increase in Costs for Older Children*

Upward modification is frequently granted on the basis of the increased costs associated with older children. However, the petitioner must provide the court with more than general allegations of increased costs. In *Havens v. Broocks*, the Mississippi Court of Appeals upheld an increase in child support from $250 to $500 a month based upon evidence of the educational and extracurricular activities of the teenage children.[126] In contrast, in *Turner v. Turner*, the court held that a chancellor erred in increasing child support based upon the custodial mother's general statements that the costs associated with the child had increased.[127] The movant must "show that increased financial obligations have eaten away so significantly at the purchase power" of the award that it no longer meets the child's needs.[128] A specific instance of increased costs arises when the custodial parent seeks modification to cover expenses of a college education. The Mississippi court has held that a child's decision to attend college can be a material change in circumstances requiring modification of the decree.[129]

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[125] Compare with the result in states with statutory modification based upon a difference in application of the guidelines. *See infra* notes 133-36 and accompanying text.

[126] 728 So. 2d 580, 583 (Miss. Ct. App. 1998).

[127] 744 So. 2d 332, 336 (Miss. Ct. App. 1999). In *Wallace v. Bond*, the court reversed a chancellor's upward modification of child support from $1000 to $1400. The mother's general allegations of increased child support costs, without evidence of the increased costs, was not sufficient to show a material change in circumstances. 745 So. 2d 844, 850 (Miss. 1999)

[128] *Turner*, 744 So. 2d at 336.

[129] Lawrence v. Lawrence, 574 So. 2d 1376 (Miss. 1991).

3. *Inflation*

In *Tedford v. Dempsey*, the Mississippi court cited inflation since the original decree as the third general factor supporting an upward modification.[130] In *McKee v. McKee*, the court upheld a chancellor's increase in the child support from $6,000 to $10,000 per year six years after the initial decree.[131] The court noted that the children were older, with one in college, and that "all of their expenses have greatly increased, due in no small measure to an average inflation factor of 8% a year for six years."[132]

C. *Impact of Child Support Guidelines*

The discussion above sets out the common law, pre-guidelines standard for modification. Pursuant to federal mandate,[133] Mississippi child support statutes provide that the guidelines create "a rebuttable presumption in all judicial or administrative proceedings regarding the awarding *or modifying* of child support awards in this state."[134] Courts in other states have struggled with the relationship of the guidelines to the traditional standards for modification. For example, courts are split as to whether the enactment or amendment of guidelines constitutes a change in circumstances sufficient to warrant a modification of a child support judgment.[135] More commonly, courts must determine whether an increase in income which would produce a different award under the statute qualifies as a material change in circumstances without the necessity of additional proof of the child's needs. Most states have dealt with this issue by providing by statute that a material change in circumstances has occurred if the existing award varies by a certain percentage from the amount that current application of the guidelines would produce. For example, Alabama law provides that "[t]here is a rebuttable presumption that child support should be modified when the difference between the existing support award and the amount determined by application of the guidelines varies more than 10%."[136] These statutes remove the need to prove the child's expenses in addition to the payor's increase in income.[137] Even in states where an increase in income alone can constitute a material change in circumstances, such a statute removes the uncertainty regarding the extent of increase necessary to qualify as "substantial."

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[130] Tedford v. Dempsey, 437 So. 2d 410, 419 (Miss. 1983). The payor father argued that no increase should be awarded, since it was foreseeable at the time of the divorce that inflation would occur, the children would age, and the parent's salaries would increase over time. The court refused to apply the foreseeability test to these naturally occurring increases: "James would have us hold here that, because these things were reasonably foreseeable back in May of 1979 and because the separation agreement makes no reference to them, Marie has 'waived' the claims she now makes. Surely, that cannot be the law." *Tedford*, 437 So. 2d at 419.

[131] 382 So. 2d 287, 289 (Miss. 1980).

[132] *McKee*, 382 So. 2d at 289.

[133] *See* Bell, *supra* note 54, at 599.

[134] MISS. CODE ANN. § 43-19-101 (emphasis added).

[135] *See* Schmitt v. Schmitt, 477 N.W.2d 563, 566 (Neb. 1991); Rohrbach v. Rohrbach, 531 N.E.2d 773, 774 (Ohio Ct. App. 1988); Milligan v. Milligan, 407 S.E.2d 702, 704 (Va. Ct. App. 1991) (all holding that enactment of child support

There is no Mississippi statute providing that a material change has occurred when an existing order varies from the guidelines by a certain percentage. When income increase is a reason for modification, the court still applies the "material change in circumstances" test. Nonetheless, once a material change is shown the court recognizes that the guidelines are applicable. In *Wallace v. Bond*, the court reversed a chancellor's increase of support in a modification action for failure to apply the statutory guidelines and to make findings of fact to justify deviation from the guidelines.[138] Thus, in a modification ac-

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guidelines constitute change in circumstances). *But see* Davis v. Davis, 535 So. 2d 183, 184 (Ala. Civ. App. 1988); Willingham v. Willingham, 410 S.E.2d 98, 99 (Ga. 1991); Thurman v. Thurman, 559 So. 2d 1014, 1017-18 (Miss. 1990) (all holding that enactment of guidelines, alone, is not sufficient to constitute change in circumstances).

[136] ALA. R. JUD. ADMIN. 32 (A)(3)(b).

[137] An exception is frequently made when the original award resulted not from application of the guidelines but from a deviation from the guidelines. In that case, the party requesting modification must show that a material change in circumstances other than application of the guidelines has occurred.

[138] 745 So. 2d 844 (Miss. 1999). The court also reversed because of the custodi-

tion in Mississippi, the petitioner must first show that an increase in income constitutes a substantial increase to satisfy the material change standard. If this showing is made, then the guidelines are applied to determine the appropriate award.

D. Escalation Clauses

To avoid the need for court-ordered modification parties have attempted to privately contract for periodic revision of awards through the use of escalation clauses in the original child support order. Escalation clauses typically tie support to a percentage of the payor's salary or provide for increases when the children reach a certain age. The response of courts to escalation clauses has been mixed. The following section examines the responses of other states and the Misssippi response.

1. Cases Upholding Percentage of Income Awards

A number of courts have upheld percentage of income awards. For example, the Georgia Supreme Court enforced a settlement agreement requiring the father to pay $400 per month plus twenty percent of all earnings over $18,000 per year in support of his three children.[139] Similarly, the Appellate Court of Illinois upheld a court order requiring the father to pay forty percent of his income as child support per month.[140] The Washington Supreme Court in *Edwards v. Edwards* upheld an escalation clause requiring the father to pay twenty percent of a bonus or salary increase in addition to a set monthly amount in child support.[141] The court held that percentage escalation clauses, which are related to the non-cus-

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al parent's failure to prove a material change in circumstances. *Wallace*, 745 So. 2d at 848-49.

[139] Chandler v. Ratcliffe, 285 S.E.2d 694, 695 (Ga. 1982) (stating that the father's obligation was created by unambiguous and unqualified language of the contract).

[140] Runge v. Kohn, 430 N.E.2d 58, 62 (Ill. App. Ct. 1981) (court held that the wife accepted set-sum checks for six years as evidence of an agreement between the parties to modify the initial agreement).

[141] 665 P.2d 883, 883 (Wash. 1983).

todial parent's ability and the child's needs, are valid.[142] The court summarized the problems posed by such awards:

> Once decreed, however, child support awards rapidly become obsolete in the face of inflation. As a result, the custodial parent must either repeatedly return to court to modify the decree, which results in additional attorneys fees, court congestion, and emotional trauma, or face the prospect of increasingly inadequate support. . . . . Apart from inflation, the financial needs of children increase as they grow. Thus, fixed awards force judges into the near impossible task of fashioning an award that meets not only the children's present needs but all their foreseeable financial requirements as well. . . . The escalation clause represents a judicial compromise which allows full consideration of both the ability to pay and the child's future needs.[143]

The court added that the court should set a maximum amount beyond which the support award should not increase and should consider the relevant statutory factors in setting this amount.[144]

2. *Cases Rejecting Percentage of Income Awards*

Other courts have rejected this attempt to produce a flexible award. The court of appeals of Indiana determined that the automatic increase and decrease of the amount of child support based on the single criterion of non-custodial parent income to be improper in *Hunter v. Hunter*.[145] The trial court ordered the father to pay child support on a "sliding" scale that changed weekly based on the amount the father earned in commissions.[146] The court of appeals found several defects in escalating the child support based solely on the father's income. First, this "sliding" scale is solely a function of the father's ability to pay and does not consider the needs and welfare of the child.[147] Second, the court stated that while a child's needs are persistent and constant, this support order is speculative and ambiguous.[148] Finally, the court reasoned that a self-adjusting child support order increases the risks of uncertainty, evasiveness, and resulting litigation.[149] The court in *Stanaway v. Stanaway* held that the escalation clause violated both the spirit and the letter of that state's statute.[150] In striking down the clause that required the father to pay six percent of his income in child support, the court faulted the clause because it allowed continual alteration in the amount of support and focused solely on the circumstances of the parent while ignoring those of the child.[151] The Supreme Court of Oregon held that a sliding-scale escalation clause based solely on a change in earnings of the father was against the policy of the state.[152] The court stated that future changes in the amount of support must be made after considering all surrounding circumstances rather than only the change in earnings of one parent.[153]

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[142] *Edwards*, 665 P.2d at 886.

[143] *Id.* at 885. (quoting Jay M. Zilter, Annotation, *Validity and Enforceability of Escalation Clause in Divorce Decree Relating to Alimony and Child Support*, 19 A.L.R. 4th 830, 832-33 (1983)).

[144] *Id.* at 886.

[145] 498 N.E.2d 1278 (Ind. Ct. App. 1986).

[146] *Hunter*, 998 N.E. 2d at 1283.

3. *Cases Rejecting Increases Tied to Child's Age*

In *McManus v. McManus*, the Illinois Court of Appeals reversed the self-adjusting aspect of the child support judgment.[154] The initial child support order required the father to pay child support in steadily increasing amounts based on the child's age.[155] The court stated that a child support order must consider the needs of the child and the separate income of each parent.[156] The court reasoned that these factors cannot be anticipated by making the child support award increase automatically with the child's age.[157] In *Larimore v. Larimore*, the Supreme Court of Oklahoma struck down an escalation clause calling for automatic increases in child support payments on the children's birthdays, holding that the automatic increase of child support based on a single criterion is improper due to its speculative nature.[158] The court noted that whether a child will be in need of additional support or whether a parent will be able to provide it is not contingent on the child's age.[159] In *Penkoski v. Patterson*, the District Court of Appeal of Florida struck down a judgment providing automatic changes in support payments.[160] The escalation clause required the father to pay $300 per month until the child turned five, $400 per month thereafter until the child turned ten, and $500 per month thereafter.[161]

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[147] *Id.* at 1288.

[148] *Id.*

[149] *Id.*

[150] 245 N.W.2d 723, 724 (Mich. Ct. App. 1976).

[151] *Stanaway*, 245 N.W.2d at 724.

[152] Picker v. Vollenhover, 290 P.2d 789, 801 (Or. 1955).

[153] *Picker*, 290 P.2d at 801.

[154] 348 N.E.2d 507, 509 (Ill. App. Ct. 1976).

[155] *McManus*, 348 N.E.2d at 508.

[156] *Id.* at 509.

4. *The Mississippi Approach*

a. *Rejecting Percentage of Income Awards and Awards Tied to Age*

Although the Mississippi Supreme Court has urged lawyers to use escalation clauses, the court has until recently rejected almost every attempt to create an enforceable escalation agreement. In *Tedford v. Dempsey*, the Mississippi court encouraged lawyers to use escalation clauses tying the escalation to parent's earning or an inflation index.[162] Later, in *Wing v.*

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[157] *Id.*

[158] 617 P.2d 892, 894 (Okla. 1980).

[159] *Larimore*, 617 P.2d at 894.

[160] 440 So. 2d 45, 46 (Fla. Dist. Ct. App. 1983).

[161] *Penkoski*, 440 So. 2d at 46. *See also In re* Marriage of Moore, 453 N.E.2d 102, 105 (Ill. App. Ct. 1983). The original agreement required the father to pay $1000 per child for the first year; an escalation clause provided that the payments increase by $1000 per child each year until each child reached the age of 18 or the end of high school. *Moore*, 453 N.E. 2d at 104. The Appellate Court of Illinois determined that the escalation clause was arbitrary since the fixed increases were triggered solely by the passage of time; the court distinguished this case from cases where the escalation of child support was tied to the payor's income. *Id.* at 105.

[162] 437 So. 2d 410, 419, (Miss. 1983).

Wing, the court again recognized the value of escalation clauses to build in increases in child support.[163] The separation agreement in that case stated that child support would increase each year according to the rate of inflation "in the consumer price index."[164] The court held that the agreement was not specific enough to be enforced since it did not specify a particular index to be used and was not tied to the father's income and the child's needs.[165] The court stated that such clauses should specify the index, show the applicable ratio, calculate the base figure, establish frequency of adjustments, and establish an effective date for adjustment.[166] Since then the court has repeatedly disapproved lawyers' attempts to design escalation clauses. In *Gillespie v. Gillespie,* the Court struck down a court-ordered escalation clause, which stated that support would increase from $250 to $300 per month when the child entered kindergarten.[167] The court held that the escalation clause must be tied to the parent's income and the child's needs rather than simply to an increase in the child's age.[168] A clause combining a fixed support award with a percentage of higher income was invalidated in *Morris v. Stacey.*[169] A chancellor's order that a father pay ten percent of any income over $50,000 as child support was deemed unenforceable because it did not take into account the mother's income, inflation, and the needs of the children.[170]

b. Escalation Clauses Based on the Statutory Guidelines

In *Luckett v. Luckett,* however, the court of appeals recently approved an agreed escalation clause, which provided that child support would increase to an amount consistent with the statutory child support guidelines if the payor became employed.[171] Recognizing that supreme court opinions have refused to enforce similar provisions for failure to take into account the child's needs, the inflation rate, and the payee's income, the court distinguished an escalation clause based on the statutory guidelines rather than a percentage that was "chosen randomly."[172] A few months later the court upheld a chancellor's refusal to apply an escalation clause calling for payment of $300 a month or twenty-five percent of adjusted gross income, whichever was greater, because the clause was a flat percentage increase based only upon the payor's income and not the child's needs or the payee's income.[173] In this case, the escalation clause did not use the statutory percentage as did the clause approved in *Luckett.* It remains to be seen whether *Luckett* will be extended to all escalation clauses providing for modification specifically tied to the statutory guidelines or whether the case will be limited to its facts—approval only where the noncustodial parent is currently unemployed and the "escalation" clause in effect sets the initial child support order.

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[163] 549 So. 2d 944, 947 (Miss. 1989).

[164] *Wing*, 549 So. 2d at 945.

[165] *Id.* at 947.

[166] *Id.* at 948.

[167] 594 So. 2d 620, 623 (Miss. 1992).

[168] *Gillespie*, 594 So. 2d at 623.

[169] 641 So. 2d 1194 (Miss. 1994).

[170] *Morris*, 641 So. 2d at 1201.

E. Increases in Title IVD Cases

The process for modification in Title IVD cases is significantly different from modification in non-IVD cases. The Mississippi Department of Human Services Office of Child Support Enforcement is required by federal law to reexamine child support orders every three years.[174] If the order varies by fifteen percent or more from current application of the guidelines, the order may be administratively modified.[175] Thus, public assistance recipients are entitled to a regular revision of their child support orders to keep the award within the child support guidelines.

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[171] 726 So. 2d 1214, 1217 (Miss. Ct. App. 1998).

[172] *Luckett*, 726 So. 2d at 1215.

[173] Ligon v. Ligon, 743 So. 2d 404, 406 (Miss. Ct. App. 1999).

[174] LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, § 5.04[a], at 5-13.

[175] MORGAN, *supra* note 174, Table 5-1, at 5-12.

F. Actions To Decrease Support Awards

1. Based Upon Decrease in Income

A payor may request a downward modification of support based upon a decrease in income. In addition to showing a material change of circumstances occurring since the original child support award, a payor must also show that the decrease was not voluntary and was in good faith.[176] Part I discusses application of the voluntary/good faith test in determining whether income should be imputed to an under- or unemployed noncustodial parent in making the initial award.[177] Similarly, in a modification action based upon reduced income, the court will impute income to the payor if the reduction was voluntary or not in good faith. For example, staying home with a new child is not a good reason for leaving work.[178] Similarly, if the payor claims the reduction is caused by ill health, a modification will be refused unless the payor presents medical evidence to support the claim.[179]

The discussion of imputation in Part I applies equally to modification and will not be repeated in full here. However, one additional element must be considered in modification actions. The decrease in income must be one that could not reasonably have been anticipated at the time of the original child support award. Thus, where a husband quit his job to return to college very shortly after the divorce decree, the reduction was not a new circumstance because it must have been foreseeable at the time of the divorce.[180] In a similar case, the court upheld a chancellor's refusal to modify child support based upon a physician's alleged decrease in income from $300,000 a year to $93,000 a year.[181] Dr. Poole testified that he was unable to pursue his specialty because of depression and alcohol problems.[182] The chancellor found that these problems were evident at the time the divorce agreement was signed; thus, the changes did not result from circumstances not reasonably anticipated at the time of the agreement.[183] In another case, the court held that modification was not appropriate based upon a loss of severance pay since the obligor was aware at the time of the decree that the pay would terminate soon.[184] In contrast, the court in *McEwen v. McEwen* held that a chancellor erred in finding no substantial change, where Mr. McEwen's income after a heart attack was reduced by forty percent.[185] Child support guidelines would have produced a payment of $305 rather than the $800 he was paying.[186]

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[176] Bell, *supra* note 54, at 616.

[177] *Id.* at 616-22.

[178] *Id.* at 622.

[179] *Id.* at 620-21.

[180] Tingle v. Tingle, 573 So. 2d 1389, 1392 (Miss. 1990); *see also* Shipley v. Ferguson, 638 So. 2d 1295 (Miss. 1994).

[181] Poole v. Poole, 701 So. 2d 813, 815 (Miss. 1997).

2. *Mother's Remarriage*

In *Tedford v. Dempsey*, the court held that a father was not entitled to a reduction in child support based upon the mother's remarriage to a wealthy man.[187] Rather, the court noted that each parent is obligated to support their children to the extent of their ability and that the father's obligation should not be reduced even if the remarriage assisted the mother to meet her obligations.[188] In an unusual case, the court approved a modification in child support upon the mother's remarriage.[189] In the divorce proceeding, the father agreed to pay $800 as child support, one half of his adjusted income. One of the two children was severely disabled, requiring the mother's at-home presence. The mother remarried shortly after the divorce, and the father petitioned for a reduction.[190] Given that the monthly payment was fifty percent of his adjusted income, the court held that the circumstances, including her remarriage, warranted a modification.[191]

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[182] *Poole*, 701 So. 2d at 814.

[183] *Id.* at 818.

[184] Nichols v. Tedder, 547 So. 2d 766 (Miss. 1989).

[185] 631 So. 2d 821 (Miss. 1994).

[186] *McEwen*, 631 So. 2d at 823.

[187] 437 So. 2d 410, 421 (Miss. 1983).

[188] *Tedford*, 437 So. 2d at 421.

[189] Crist v. Lawrence, 738 So. 2d 267, 269-70 (Miss. Ct. App. 1999).

[190] *Crist*, 738 So. 2d at 269.

3. *Birth or Adoption of Additional Children*

In *Bailey v. Bailey*, the Mississippi Supreme Court refused to permit a noncustodial mother to reduce her child support obligations based upon increased expenses for a new child.[192] Faced with the Mississippi statute, which permits chancellors to deduct an appropriate amount for children living in the home of the payor, the court held that this provision did not permit noncustodial parents to reduce their obligations to prior children.[193]

4. *Based upon Difficulty in Meeting Obligation*

The court is not sympathetic to requests for reduction by payors who find themselves unable to meet obligations they agreed to in a divorce settlement. The court of appeals refused a downward modification of child support for a payor who agreed to pay fifty percent of his income for child support and incurred significant debt in an attempt to meet his obligations.[194]

G. *Effective Date of Modification*

The effective date of modification depends upon whether the modification increases or decreases the initial award. A downward modification may be made effective only prospectively: from the date of judgment in the modification action. In *Cumberland v. Cumberland*, the Mississippi Supreme Court reversed a chancellor's order making a downward modification retroactive to the date the petition was filed.[195] On the other

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[191] *Id.*

[192] 724 So. 2d 335, 338 (Miss. 1998).

[193] *Bailey*, 724 So. 2d at 338.

[194] Lack v. Nash, No. 98-CA-00073-COA, 1999 WL 432582 (Miss. Ct. App. June 29, 1999) (stating that personal bills are not reason to reduce support).

[195] 564 So. 2d 839, 847 (Miss. 1990). The court explained:

> No party obligated by a judicial decree to provide support for minor children may resort to self help and modify his or her obligation with

hand, the court has held that the better view is that an increase in child support should be retroactive to the date of filing the petition for modification, but leaving the matter to the chancellors' discretion.[196]

VI. ENFORCEMENT OF SUPPORT ORDERS

Part I of this article, and the preceding portion of Part II, focus on the establishment or modification of a child support award. The fact that an award has been initially set, or modified, does not guarantee payment. Collection of child support has proven to be a serious national problem, prompting significant federal legislation over the last fifteen years. As the section above illustrates, common law principles still control most support modification questions in Mississippi. In contrast, the law governing enforcement of support awards has been federalized to the same extent as child support guidelines. The section below discusses remedies available for enforcement of the initial child support award, procedures for establishing the amount of arrearages when a payor becomes delinquent, and methods of collecting support arrearages.

A. *Enforcing the Initial Order*

Prior to federal intervention in child support enforcement the primary enforcement tools were contempt actions and wage garnishment. Concern over the alarming level of nonpayment of support[197] led Congress to pass the Child Support Enforce-

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> impunity. . . . More pragmatically, . . . [t]he rule we announced in *Thurman* and reaffirm today provides sharp incentives for one who would have his support obligation reduced to bring the matter to trial as expeditiously as possible.

Id. The court also noted the distinction between child support reductions, which may not "relate back" to the date of filing and alimony reductions, which may. *Id.* (citing McHann v. McHann, 383 So. 2d 823, 825-26 (Miss. 1980)).

[196] Lawrence v. Lawrence, 574 So. 2d 1376, 1384 (Miss. 1991).

[197] A 1985 Census Bureau report estimated that one quarter of custodial mothers received no support at all and fewer that one-half received the full amount ordered. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMONY: 1985 (Current Pop. Rep., Series P-23. No.154, 1989), cited in MORGAN, *supra*

ment Amendments of 1984, an Act that mandated enhanced collection efforts by states. Measures included income withholding, tax refund interception, and other collection tools.[198] Subsequently, in 1996, as a part of welfare reform, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[199] PRWORA made substantial changes in child support enforcement proceedings by increasing or expanding tools for enforcement. The Act established a "new hire" registry, expanded the parent locator service,[200] created new paternity procedures, required state inclusion of liens on business and professional licenses, and required that each state adopt the Uniform Interstate Family Support Act (UIFSA).[201] Today, state enforcement of child support is largely mandated by federal law. The sections below outline the state and federal tools for collection of child support, collection of arrearages, and location of absent parents. Availability of the remedies may depend on whether the case involves public assistance recipients ("IVD cases") and is handled by the Department of Human Services or is a private case outside the state agency ("non-IVD case"). The Department may also handle cases that do not involve public assistance, creating a third category of cases ("non-assistance IVD cases").

1. *Income Withholding*

As a result of federally mandated provisions, most support orders are now accompanied by an order for income withholding. As one child support authority states, "Income withholding

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note 174, §1.01, at 1-4, n.11.

[198] 42 U.S.C. §§ 651-669; *see* D. Dodson & N. Hurowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 FAM. L. REP. (BNA) 3051 (1984).

[199] 42 U.S.C. §§ 601-615 (replacing AFDC with the Temporary Assistance to Needy Families (TANF) program); 42 U.S.C. § 608(a)(7) (capping welfare assistance payments to a family at five years under programs administered through block grants to the states).

[200] 42 U.S.C. § 653(i) (Supp. 1999); 42 U.S.C. § 653; 42 U.S.C. § 666(a)(5); 42 U.S.C. § 666(a)(4),(16); 42 U.S.C. § 666(f).

[201] 42 U.S.C. § 666(f).

is no doubt the king of child support collection tools."[202] Requirements for withholding differ depending on whether the custodial parent receives public assistance.

a. IVD Cases

If the custodial parent is a recipient of public assistance, a withholding order must accompany a support order with the Department of Human Services as the designated agency to receive payments.[203] The order should provide for withholding additional amounts upon receipt of an affidavit of delinquency or notarized record of overdue payments from the department.[204] In IVD cases in which there is an existing support order not accompanied by a withholding order, the Department is authorized to enter administrative orders for income withholding.[205] In addition to directing the payor to withhold for the current support payment, the order should require withholding an additional amount equal to twenty percent of the current support obligation for any delinquency.[206]

b. Non-IVD cases

In cases not brought by the Department of Human Services, income withholding is required for any support order issued, modified, or found to be in arrears after January 1, 1994 unless one of the parties proves to the court's satisfaction that there is good cause not to require immediate income withholding or if both parties agree in writing to an alternative arrangement.[207] An order which is not initially subject to income withholding automatically becomes so if the court finds that a support payment is thirty days past due.[208] An order for withholding under these circumstances may be served by the custodial parent's attorney, the department, or the court clerk without a court hearing.[209] The obligor may contest the order of withholding on additional or subsequent payors by filing an action with the issuing court.[210]

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[202] Teresa A. Myers, *State Child Support Programs: Necessity Inspires Ingenuity*, 11 No. 4 DIVORCE LITIGATION 71, 72 (1998).

[203] MISS. CODE ANN. § 93-11-103(1).

[204] MISS. CODE ANN. § 93-11-103(1).

[205] MISS. CODE ANN. § 93-11-105(1).

[206] MISS. CODE ANN. § 93-11-105(2). The order should also direct the payor not to withhold in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 U.S.C. § 1673 as amended. *Id.*

[207] MISS. CODE ANN. § 93-11-103(2).

c. *Limits on Wage Withholding*

The usual limits on wage garnishment[211] do not apply to support orders. Employers may withhold between fifty and sixty-five percent of the disposable earnings[212] of an employee pursuant to a support order.[213] If the employee is supporting

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[208] MISS. CODE ANN. § 93-11-103(3).

[209] Notice may be served "by first class mail or personal delivery on the obligor's payor, superintendent, manager, agent or subsequent payor." MISS. CODE ANN. § 93-11-103(4).

[210] MISS. CODE ANN. § 93-11-103(3). The order should

> (a) Direct any payor to withhold an amount equal to the order for current support; (b) Direct any payor to withhold an additional amount, not less than ten percent (10%) of the order for support, until payment in full of any delinquency; and (c) Direct the payor not to withhold in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.

MISS. CODE ANN. § 93-11-103(5).

[211] The usual limits on garnishment are the lesser of twenty-five percent of disposable earnings or "the amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage." MISS. CODE ANN. § 85-3-4 (2).

[212] Disposable earnings are defined in 15 U.S.C. § 1672(b): "The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld."

[213] *See* MISS. CODE ANN. § 85-3-4 (3)(b):

> (b) Except as provided in subparagraph (b)(iii) of this subsection (3), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed:
> (i) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), fifty percent (50%) of such individual's disposable earnings for that week; and
> (ii) Where such individual is not supporting such a spouse or dependent

a spouse or dependent other than the person for whom support is ordered, the maximum withholding is fifty percent for regular, current support payments, and fifty-five percent for payments that are more than twelve weeks in arrears.[214] If the employee is not supporting a family, the maximum withholding is sixty percent for current payments and sixty-five percent for payments in arrears.[215]

d. Priority of Child Support Withholding Orders

Child support orders have priority over all wage garnishments. In fact, recent legislation provides that child support orders are not considered garnishments.[216] Employers are directed to withhold income for support "without regard to any prior or subsequent garnishments, attachments, wage assignments or any other claims of creditors."[217] If an employee is subject to more than one child support order, the orders are paid on a pro rata basis without regard to the order in which they were received.[218]

> child described in subparagraph (b)(i) of this subsection (3), sixty percent (60%) of such individual's disposable earnings for that week;
> (iii) With respect to the disposable earnings of any individual for that workweek, the fifty percent (50%) specified in subparagraph (b)(i) of this subsection (3) shall be deemed to be fifty-five percent (55%) and the sixty percent (60%) specified in subparagraph (b)(ii) of this subsection (3) shall be deemed to be sixty-five percent (65%), if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the period of twelve (12) weeks which ends with the beginning of such workweek.

Id.

[214] MISS. CODE ANN. § 85-3-5 (3)(b)(iii).

[215] MISS. CODE ANN. § 85-3-5 (3)(b)(iii).

[216] MISS. CODE ANN. § 93-11-103(10).

[217] MISS. CODE ANN. § 93-11-111(7).

[218] MISS. CODE ANN. § 93-11-111(8). The employer is instructed to withhold "an amount for each order that is in direct proportion to the percentage of the obligor's adjusted gross income that the order represents, and the payor shall honor all such withholdings to the extent that the total amount withheld does not exceed the maximum amount specified in subsection (1) of this section." *Id.*

2. Bond

The chancery court has power, in setting support, to require that the payor provide bond or sureties to secure a child support order.[219] If no bond is provided in the initial hearing, bond may later be imposed if the payor is thirty days delinquent in payments. The payor is entitled to a hearing prior to imposition of bond.[220] The court in *Bush v. Bush* held that a chancellor erred in failing to require bond where the father lived out of state, stated that he did not know where his work would take him, and had an outstanding child support arrearage already.[221]

3. Payment to a Trustee

A court may order payment of child support to the custodial parent or to a person designated as trustee. If the child or custodial parent is a recipient of public assistance, the Department of Human Services must be made the trustee for payment.[222]

B. Establishing Arrearages

The section above describes tools available for enforcing the initial award of child support. If a payor falls behind in support, additional tools are available for establishing the amount of the arrearage, for collecting the arrearage, and to act as penalties for nonpayment. Recent federally mandated state enforcement provisions should greatly enhance collection and enforcement efforts.

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[219] *See* MISS. CODE ANN. § 93-5-23. "The court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given." *Id.*

[220] MISS. CODE ANN. 93-11-65(3).

[221] 451 So. 2d 779, 782 (Miss. 1984) (stating that circumstances would "make it difficult for Mrs. Bush to locate him and for any court to exercise jurisdiction over him").

[222] MISS. CODE ANN. 93-11-65(1)(a).

1. *Obtaining a Judgment for Arrearages*

The first step in collecting past due child support is to establish the amount of arrearage and obtain an enforceable judgment for that amount. Until recently, payees were required to file a complaint, prove the arrearage, and obtain a judgment, which was then entered on the judgment rolls as a lien on the property of the debtor.[223] A 1997 amendment to this statute provides that whenever child support is more than thirty days delinquent, "a judgment by operation of law shall arise against the obligor in an amount equal to all payments which are then due and owing. A judgment arising under this section shall have the same effect and be fully enforceable as any other judgment entered in this state."[224] The amendment permits the Department of Human Services or a private attorney to enroll the automatic judgment by filing an abstract of the order for child support and sworn documentation of the amount of the delinquency.[225]

2. *Proof of Arrearages*

In actions before a court for a judgment for arrearages, the Mississippi Court of Appeals has refused to overturn judgments based on less than precise testimony. In *Andrews v. Williams*, the court upheld a chancellor's finding of arrearages based upon the custodial parent's testimony based largely on her memory of payments over a ten-year period.[226] Rejecting the payor's argument that this proof was insufficient in light of his testimony that many of the payments were made by money orders for which he no longer had receipts, the court of appeals held that, although the testimony was "vague and imprecise," the chancellor's finding would not be disturbed.[227] In another case, the court upheld an award even though the payor was able to demonstrate at trial that the "piece of paper" on which the payee based her accounting contained a number of errors.[228] Acknowledging that the evidence was "vague and indefinite to some extent," the court held that the chancellor did not commit manifest error.[229]

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[223] *See* prior version of MISS. CODE ANN. § 93-11-71.

[224] MISS. CODE ANN. § 93-11-71(1).

[225] MISS. CODE ANN. § 93-11-71(2). The statute further provides that the lien, once enrolled, is enforceable as any other judgment lien. However, it also provides that enrollment is not necessary for seizure of certain funds, including goverment payments, unemployment, workmen's compensation, lottery and gaming winnings, public and private retirement funds, financial institution deposits, and recovery in civil suits. § 93-11-71(3).

[226] 723 So. 2d 1175, 1178 (Miss. Ct. App. 1998).

3. *Modification or Forgiveness of Arrearages*

The Mississippi Supreme Court has repeatedly held that a chancery court cannot relieve civil liability for support payments that have already accrued.[230] This is true even if the payor could have obtained a reduction by filing a modification action. For example, in *Barfield v. State*, the court of appeals refused to overturn a contempt citation against a father who argued that an $83,000 arrearage should be set aside because he had been unemployed and clearly unable to pay the agreed $1000 a month child support.[231] The court noted that Barfield had agreed to the child support with knowledge of his circumstances and had failed to seek modification to reduce his obligation.[232] In *Tanner v. Roland,* a chancellor reviewed an agreement entered in a prior modification action and held that the agreement, which provided for an increase in child support and payment of certain medical expenses, had excused prior arrearages.[233] The court reversed, stating, "Once they have become vested, just as they cannot be contracted away by the parents, they cannot be modified or forgiven by the courts. Each payment that becomes due and remains unpaid "becomes

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[227] *Andrews*, 723 So. 2d at 1178.

[228] Glass v. Glass, 726 So. 2d 1281 (Miss. Ct. App. 1998).

[229] *Glass*, 726 So. 2d at 1285.

[230] *See* Tanner v. Roland, 598 So. 2d 783, 787 (Miss. 1992); Thurman v. Thurman, 559 So. 2d 1014, 1016-18 (Miss. 1990); Brand v. Brand, 482 So. 2d 236, 237 (Miss. 1986); Hailey v. Holden, 457 So. 2d 947, 951 (Miss. 1984); Hambrick v. Prestwood, 382 So. 2d 474, 476 (Miss. 1980).

[231] 749 So. 2d 331, 340-41 (Miss. Ct. App. 1999).

[232] *Barfield*, 749 So. 2d at 341.

[233] 598 So. 2d 783, 787 (Miss. 1992).

'a judgment' against the supporting parent."[234]

4. Defenses to Arrearages

a. Statute of Limitations

The seven-year statute of limitations, which is generally applicable to judgments in Mississippi,[235] applies to actions to collect child support arrearages. However, the seven years does not begin to run until the child in question reaches twenty-one. The Mississippi savings statute provides that "[i]f any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy . . . , he may bring the actions . . . after his disability shall be removed as provided by law."[236] The Mississippi Supreme Court has held that, pursuant to this statute, either the child or the custodial parent may bring the action within seven years after the child's majority.[237] In *Vice v. Department of Human Services*, the court permitted a custodial mother to bring an action for past due support two years after her youngest child reached twenty-one.[238] Mr. Vice argued that the savings clause of section 15-1-59 applied only to the children's suit and did not save the mother's right to assert her children's claim because she was not under the disability of minority; he also argued that any monies awarded to Ms. Smith at this point would constitute unjust enrichment since both of the children were emancipated at the time of the petition for enforcement.[239] The court held that a mother is entitled to bring suit after the children are emancipated for support payments due prior to their emancipation.[240]

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[234] *Tanner*, 598 So. 2d at 787. *See also* Varner v. Varner, 588 So. 2d 428, 432-33 (Miss. 1991); Premeaux v. Smith, 569 So. 2d 681, 685 (Miss. 1990); *Thurman*, 559 So. 2d at 1016-17; *Cumberland*, 564 So. 2d at 847.

[235] MISS. CODE ANN. § 15-1-43.

[236] MISS. CODE ANN. § 15-1-59.

[237] *See* Wilson v. Wilson, 464 So. 2d 496, 498-99 (Miss. 1985); *Glass*, 726 So. 2d at 1286.

[238] 702 So. 2d 397, 400 (Miss. 1997).

[239] *Vice*, 702 So. 2d at 400.

[240] *Id.* at 402.

b. Estoppel

In some states, a payor may defend an action for past due support by proving an out-of-court agreeement with the custodial parent to modify support. In addition, some courts find a waiver or estoppel based upon implied agreement to modify if the custodial parent has accepted reduced payments without objection over a substantial period of time.[241] The Mississippi Supreme Court has held, in contrast, that child support obligations may not be modified by the parents without the approval of the court. A prior agreement to modify is not a defense to the custodial parent's action for past due support based on the original order. In *Varner v. Varner*, based upon an agreement with the mother, the father reduced support to $400 when one daughter came to live with him, to $200 when a second child came to live with him, and to $0 when the youngest went to college and he sent money directly to her.[242] Subsequently, the mother sued him for ten years of back support totalling $67,000.[243] The court noted that past due child support cannot be modified and that an obligor may not modify his obligation without approval of the court.[244] The court did note, however, that the father could receive credit on remand for amounts actually expended on his daughters.[245]

c. Waiver

The Mississippi Supreme Court has recognized the doctrine of waiver as a defense to child support payment, including arrearages, in at least one extreme case. In *Cole v. Hood*, the court refused to award past due child support to a mother who had hidden the children for eight years without revealing their location.[246] Relying on the maxim that she who comes into equity must come with clean hands, the court held that she had waived her right of child support.

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[241] *See* Sonenfeld v. Sonenfeld, 49 N.W.2d 60, 62 (Mich. 1951); Hartman v. Smith, 674 P.2d 176, 179 (Wash. 1984).

[242] 588 So. 2d 428, 431 (Miss. 1991).

[243] *Varner*, 588 So. 2d at 431.

[244] *Id.* at 433-34.

[245] *Id.* at 434-35.

[246] 371 So. 2d 861, 863 (Miss. 1979).

d. Laches

Mississippi is in line with most states in refusing to recognize a defense of laches to a custodial parent's action for back child support.[247] In *Glass v. Glass*, the court held that an action for child support arrearages was not barred by laches even though there was an otherwise inexcusable sixteen-year delay in seeking payment.[248] The court held that there was no undue prejudice to the payor, even though bank records prior to 1990 were no longer available to him since he was well aware that the custodial parent was trying to collect payments and never indicated that she was forgiving the obligation.[249]

e. Credit for Direct Payment

(1) By Parent

The Mississippi Supreme Court will permit reduction of child support arrearages upon proof that the noncustodial parent has provided for the child through direct expenditures or payments to the child. In *Varner v. Varner*, the court remanded a case to allow a father to prove direct expenditures to offset arrearages claimed for periods during which the children actually lived with him or were in college.[250] The court recognized the right to credit in another case in which the mother sued the father for back support for time during which the child lived with the father and the father paid the monthly support directly to the child in addition to other support.[251] The court recognized that a petition to modify should have been filed but held that "[e]quity and good conscience forbid a windfall to a parent that did not object to a custody change and in fact simply because the other parent did not notify the court of the change either. This is particularly so where the support money continued to be paid and the child was never deprived of its use and benefit."[252]

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[247] *See, e.g.,* Thrash v. Thrash, 809 P.2d 665, 667 (Okla. 1991) (refusing to apply laches); Patten v. Vose, 590 A.2d 1307, 1309-10 (Pa. Super. Ct. 1991) (rejecting defense of laches after 20-year delay).

[248] 726 So. 2d 1281, 1287 (Miss. Ct. App. 1998).

[249] *Glass*, 726 So. 2d at 1287.

[250] 588 So. 2d 428, 435 (Miss. 1991).

[251] Alexander v. Alexander, 494 So. 2d 365, 367 (Miss. 1986).

(2) By Grandparent

In *Mizell v. Mizell*, the court held that a chancellor erred in crediting a father's arrearages with payment made by the child's paternal grandfather.[253] The payments were made from a joint account held in the names of the child and the grandfather and, according to the court, was money that the child could have withdrawn himself.[254] In a recent action, however, a father was allowed credit for sums provided by the paternal grandparents.[255] The court distinguished the holding of *Mizell* as limited to the grandparent's provision of money actually belonging to the child from a jointly held account.[256]

f. Bankruptcy

Bankruptcy is not a defense to an action to recover child support arrearages. Section 523(a)(5) of the bankruptcy code provides that "obligations in the nature of support, alimony or maintenance are nondischargeable in bankruptcy."[257]

5. Interest on Arrearages

Section 75-17-7 of the Mississippi Code provides that "judgments and decrees shall bear interest at the rate of eight percentum (8%) per annum."[258] The Mississippi Supreme Court has held that it is error for a chancellor to fail to provide for payment of interest from on a judgment for past due child support.[259] In *Brand v. Brand*, the court addressed the date on which interest begins to run.[260] Mr. Brand argued that interest should run only from the date of the chancery court's delinquency judgment; his former wife argued that interest should be computed on each installment of child support as it became due.[261] Noting that child support entitlements become fixed and vested when the payments are due,[262] that payments become a judgment against the supporting parent when due,[263] and that past due payments of alimony bear interest from the date each became due pursuant to a prior decree,[264] the court held that Ms. Brand "acquired a separate judgment on each month in the amount of each child support payment Samuel was obligated to make but failed to make. Each such installment judgment should bear interest at the legal rate from the date due until paid."[265] The court rejected the argument that this arrangement created computational difficulties. The holding, it stated, recognized the economic reality that "[w]hen a supporting spouse fails timely to make child support payments, he uses the child's money . . . . Delay in payment harms the child in a way theoretically irreparable. . . ."[266] The court went on to explain how payment on arrrearages should be applied:

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[252] *Alexander*, 494 So. 2d at 368.

[253] 708 So. 2d 55, 60 (Miss. 1998).

[254] *Mizell*, 708 So. 2d at 60.

[255] Johnston v. Parham, N0. 98.CA-00067.COA 2000 WL 137146, *2 (Miss. Ct. App. Feb. 8, 2000).

[256] *Johnston*, 2000 WL 137146, at *2.

[257] 11 U.S.C. § 523(a)(5).

[258] MISS. CODE. ANN. § 75-17-7.

> With respect to all child support payments not made when due, payments subsequently made should first be applied to aggregate interest at the legal rate accrued on such payments at the date of payment. Thereafter, sums paid should be applied to the principal amount of the supporting spouse's there-

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[259] Walters v. Walters, 383 So. 2d 827, 829 (Miss. 1980).

[260] 482 So. 2d 236, 237 (Miss. 1986).

[261] *Brand*, 482 So. 2d at 237.

[262] *See* Hailey v. Holden, 457 So. 2d 947, 951 (Miss. 1984); Cunliffe v. Swartzfager, 437 So. 2d 43, 45-46 (Miss. 1983).

[263] *Cunliffe*, 437 So. 2d at 45-46; Howard v. Howard, 191 So. 2d 528, 531 (Miss. 1966).

[264] *See* Rubisoff v. Rubisoff, 133 So. 2d 534, 537 (Miss. 1961); Schaffer v. Schaffer, 46 So. 2d 443, 444 (Miss. 1950).

[265] *Brand,* 482 So. 2d at 238.

[266] *Id.*

> tofore unpaid monthly child support obligations in order of their seniority; that is, sums paid at a time when the supporting spouse is in arrears, after first paying all interest obligations, should be applied to extinguish the principal amount of the oldest outstanding support payment, then to the principal amount of the next oldest theretofore unpaid payment, and so forth.[267]

C. Collection of Arrearages

1. Lien for Past Due Payments

As discussed above, the payee of a child support order in arrears may obtain a judgment through court action or under the automatic judgment provisions of section 93-11-71 of the Mississippi Code. In either case, the enrolled judgment becomes a lien on all real and personal property of the obligor and may be enforced as any other judgment. In addition, the judgment may be enforced through a number of different remedies, some available to all persons with a judgment for child support arrearages, and some available only for cases enforced by the Department of Human Services.

2. Effect of Court-Ordered Installment Payments

When an arrearage has been established, courts frequently order a payor to satisfy the arrearage through installment payments. The Mississippi Supreme Court has held that a court's order of installment payments does not prevent the payee from seeking immediate enforcement of the entire amount through ordinary means. In *Walters v. Walters*, the chancellor granted a stay of execution on a judgment for $3,350 in past-due child support, so long as Mr. Walters paid twenty-five dollars per month.[268] The supreme court held that the chancellor erred in staying execution on the past due amount and thereby denying the payee the right to attempt to collect the judgment through the normal collection processes, such as garnishment or writ of execution.[269] The strength of this rule was reinforced in a recent case in which the court held that a payor who had paid all but $2,827 of an $11,850 delinquency, in accordance with a 1988 order to pay $100 a month toward the deficiency, could nonetheless be reported to credit bureaus as delinquent in payment.[270]

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[267] *Id.*

[268] *Walters*, 383 So. 2d at 829.

3. *Seizure of Accounts in IVD Cases*

In IVD cases, the Department of Human Services is authorized to encumber and seize accounts[271] of delinquent payors in financial institutions in the state, defined to include credit unions, stock brokerages, public or private entities administering retirement, savings, annuities, life insurance, and/or pension funds.[272] Financial institutions are required to assist the Department by providing a quarterly report on accounts held by delinquent parents.[273] When an account is identified as belonging to a delinquent payor, the Department can encumber the account for forty-five days.[274] At the end of the forty-five days, the funds are forwarded to the Department.[275] An obligor whose account is seized may request a hearing in chancery court to challenge the encumbrance under Rule 81 (d)(2). Issues are limited to mistaken identity and mistakes in the amount of overdue support.[276] This capability, which is currently being implemented, may become the next "king of child support collection tools." Its availability may be a significant draw for non-IVD payees to seek the services of the Department.

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[269] *Id. See also* Bland v. Bland, 482 So. 2d 236, 239 (Miss. 1986).

[270] Mississippi Dep't of Human Serv. v. St. Peter, 708 So. 2d 83, 85 (Miss. 1998). The court did note that, although DHS has the statutory right to report the delinquency that "does not . . . mean that it is necessary or even advisable for it to do so in the present case. This court has some concern as to whether the actions of the DHS in the present case were necessary in light of Landon's good faith efforts to pay off the delinquency." *St. Peter*, 708 So. 2d at 85.

[271] MISS. CODE ANN. § 43-19-48(10)(b).

[272] MISS. CODE ANN. § 43-19-48(10)(a).

[273] MISS. CODE ANN. § 43-19-48(1)(a).

[274] MISS. CODE ANN. § 43-19-48(3).

[275] MISS. CODE ANN. § 43-19-48(4)(a)(ii).

[276] MISS. CODE ANN. § 43-19-48(5).

4. *Seizure of Tax Rebates in IVD Cases*

The Department is authorized to set off child support arrearages against a debtor's income tax refund or rebate in IVD cases.[277] The procedure for setoff is detailed in section 27-7-509 of the Mississippi Code. Upon notice from the Department of the arrearage, the tax agency will transfer any state tax refund over $25 to the Department and notify the taxpayer of the transfer, of the taxpayer's right to contest the transfer within thirty days, and that failure to object in writing within thirty days will constitute a waiver of the right to contest the transfer.[278] The Department may also seize federal tax refunds to satisfy arrearages.[279]

5. *Workmen's Compensation Benefits*

Either the Department of Human Services or the payee in a non-IVD case may enforce a lien for arrearages against workers' compensation benefits.[280] In non-IVD cases, the payee or his attorney may impose the lien by filing notice of the lien and attaching a certified copy of the court order with all modifications and a sworn statement by the obligee setting out the amount of the arrearages.[281]

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[277] MISS. CODE ANN. § 43-19-31(h).

[278] MISS. CODE ANN. § 27-7-509. In the case of a joint return,

> the notice shall also state the name of the taxpayer named in the return, if any, against whom no debt is claimed, the fact that a debt is not claimed against such taxpayer, the fact that such taxpayer is entitled to receive a refund if it is due him regardless of the debt asserted against his spouse, and that in order to obtain a refund due him, such taxpayer must apply in writing for a hearing with the claimant agency named in the notice within thirty (30) days of the date of the mailing of the notice. If a taxpayer fails to apply in writing for such a hearing within thirty (30) days of the mailing date of such notice, he will have waived his opportunity to contest the setoff.

§ 27-7-509(3).

[279] *See* 42 U.S.C. §§ 664(a), 666(a)(3)(A).

[280] MISS. CODE ANN. § 71-3-129. A lien may also be placed on any workers' compensation benefits to recover arrearages for spousal support payments where a minor child is living with the spouse and maintenance or spousal support is collected in conjunction with child support. § 71-3-129(1).

[281] MISS. CODE ANN. § 71-3-129(5). Notice should include: name and address of

D. Other Penalties

The remedies described above relate directly to collection of funds to offset child support arrearages. Other enforcement tools are available as penalties for nonpayment and to encourage delinquent payors to satisfy the arrearages. These tools include license revocation, credit bureau reporting, criminal prosecution, and contempt proceedings. In addition, custodial parents are further assisted in collection efforts by the recent enhancement of parent locator systems.

1. License Revocation

In 1996, the Mississippi Legislature, pursuant to federal directives, provided for revocation of various licenses as a penalty for nonpayment of child support. The Act applies to business and professional licenses, licenses to sell alcohol, driver's licenses, and hunting and fishing licenses.[282] Suspension may also be ordered when an individual fails to comply with a subpoena related to paternity or child support.[283] The Mississippi Department of Human Services Office of Child Support Enforcement may initiate the revocation process on behalf of a recipient of public assistance.[284] The Division reviews the information to determine whether the payor is at least thirty days in arrears on a support order, which includes an order for temporary or final child support, an order for reimbursement for public assistance, or an order to make periodic payments on an arrearage, or to pay a set sum on an arrearage.[285] If the

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the delinquent obligor the social security number of the obligor, if known, the name of the obligee, and the amount of delinquent child or spousal support. § 71-3-129(2).

[282] MISS. CODE ANN. § 93-11-153(b).

[283] MISS. CODE ANN. § 93-11-157(15).

[284] The Division may charge up to $25 for this service to private parties. Id. 93-11-155(2).

[285] MISS. CODE ANN. § 93-11-153(h). The statute defines delinquency as "any payments of a sum certain ordered by any court to be paid by a noncustodial parent for the support of a child that have remained unpaid for at least thirty (30) days after payment is due. Delinquency shall also include payments of a sum certain ordered by any court to be paid for maintenance of a spouse that have re-

payor is over thirty days delinquent, the Division notifies the payor that all licenses will be suspended in ninety days unless the arrearage is paid to the Division or the private attorney, or an agreed judgment is entered setting a schedule of payments to satisfy the arrearage.[286] The licensee may request a review limited to the issue of whether an arrearage exists or may negotiate for a payment schedule. If an agreement is reached, the Division submits it to the court for approval and entry of the order. If no agreement is reached, the licensee can petition the court to establish a payment schedule.[287] If the delinquency has not been cured or agreement reached by the ninetieth day, the Division notifies licensing agencies to suspend the licenses. The Division must furnish the licensee a copy of its accounting records within forty-eight hours of a written request by the licensee or his attorney or other authorized representative.[288]

A licensee has thirty days after suspension to appeal the decision by filing an action against the Department of Human Services in the chancery court in his county of residence or of the First Judicial District of Hinds County. The licensee must put up a $200 bond. The chancery court has discretion to order that the bond act as supersedeas during the appeal and must decide the appeal within thirty days of the filing of the appeal. Notice of appeal is filed in the office of the chancery clerk.[289] The regular procedures of the particular licensing agency for suspension and appeal do not apply to suspension for child support delinquency.[290]

If a licensee who has entered an agreed judgment under

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mained unpaid for at least thirty (30) days." § 93-11-153(h).

[286] MISS. CODE ANN. 93-11-157(1).

[287] MISS. CODE ANN. 93-11-157(2)-(5). This petition does not stay the suspension of the license.

[288] MISS. CODE ANN. § 93-11-157(7).

[289] MISS. CODE ANN. § 93-111-157(8). The licensee may appeal the chancery court's decision to the Mississippi Supreme Court. On motion to the chancery court, the appealing licensee may be prohibited from practicing or operating a business or otherwise using a license while the case is on appeal to the supreme court. § 93-111-157(8).

[290] MISS. CODE ANN. § 93-11-157(13).

this Act becomes thirty days delinquent on the agreed judgment, the Division may have the license suspended immediately without a hearing. The appeal provisions are equally applicable to revocation under these circumstances.[291]

In addition, the Act provides that a court may order license suspension for a delinquent payor without going through the Department of Human Services. The order may be stayed by the court for a reasonable time to allow satisfaction of the delinquency.[292]

2. *Report to Credit Bureau*

Section 93-11-69 of the Mississippi Code provides that the Department of Human Services shall report overdue support—court ordered payments delinquent for thirty days—to credit reporting agencies. The reporting requirement applies to spousal payments being collected in conjunction with child support.[293] The Department is required to send the payor a copy of the report and allow fifteen days to provide any information to dispute the report. After reexamination, the Department must send the payor a copy of the corrected report and allow ten days for the payor to contest the accuracy of the report in a written statement, which must be included in the report send to the credit bureau unless the statement is frivolous or irrelevant.[294]

The Mississippi Supreme Court has held that the Department of Human Services may report information to a credit bureau under this statute even if the payor is satisfying arrearages through a court-ordered payment plan. In *Mississippi State Department of Human Services v. St. Peter,* the court allowed DHS reporting of a delinquency even though the payor had satisfied all but $2,827 of an $11,850 arrearage by making payments for ten years pursuant to a court-ordered payment plan.[295] The court held that child support, once due, is vested and cannot be modified or forgiven by a court, nor can the court limit any of the remedies normally available for collection of the entire amount of the arrearage.[296]

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[291] MISS. CODE ANN. § 93-11-157(9). The license must be reinstated within seven days of notice that the arrearage has been cured or another agreement entered. § 93-11-157(9).

[292] MISS. CODE ANN. § 93-11-163. The Act provides that licensing agencies are to respond to court ordered suspension as an order under the act. § 93-11-163.

[293] MISS. CODE ANN. § 93-11-69(1)(d)(2).

[294] MISS. CODE ANN. § 93-11-69(3).

3. *Criminal Prosection*

A parent may be prosecuted for nonsupport of a child under the Mississippi criminal neglect statute, which provides that "[a]ny parent who shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child or children, . . . shall be guilty of a felony."[297] The Mississippi Supreme Court has rejected defendants' arguments that the statute unconstitutionally provides for imprisonment for debt for nonpayment of support, stating that "[t]his State has a legitimate interest in criminally prosecuting financially able parents who wilfully desert or fail to support their children when in destitute or necessitous circumstances."[298] In *Bryant v. State*, the court affirmed a father's conviction and two-year sentence for failure to support a deaf and retarded child whose mother could not work and care for the child, where the father had a good job and home and the child and mother at one time lived without hot water.[299] Federal law criminalizes nonsupport as well. Congress in 1992 passed the "deadbeat dad" or Child Support Recovery Act, which created criminal liability for a parent who is more that $5000 in arrears in support or over one year in arrears.[300]

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[295] 708 So. 2d 83, 85 (Miss. 1998).

[296] *St. Peter,* 708 So. 2d at 85.

[297] MISS. CODE ANN. § 97-5-3. The penalty for a first offense is a fine of not less than $100 nor more than $500, or a five-year sentence, or both; for a second or subsequent offense, a fine of between $1,000 and $10,000 or imprisonment for two to five years, or both. § 97-5-3.

[298] Bryant v. State, 567 So. 2d 234, 236 (Miss. 1990). *See also* Martin v. State, 308 So. 2d 925, 926 (Miss. 1975); Williams v. State, 43 So. 2d 389 (1949).

[299] *Bryant*, 567 So. 2d at 236. *See also* Knowles v. State, 708 So. 2d 549, 554 (Miss. 1998) (holding that amended statute no longer requires proving that children were destitute).

[300] 18 U.S.C. § 228 (1994).

4. Contempt Proceedings

Both civil and criminal contempt proceedings are available as sanctions for nonsupport, although criminal contempt is rarely used. Civil contempt is defined as an action designed to obtain compliance with an order, while criminal contempt is aimed at punishment for nonsupport.[301] Civil contempt is the simpler proceeding since criminal contempt requires observance of the safeguards available in criminal proceedings generally.[302] In civil contempt, the payee establishes a prima facie case by proving that child support was ordered and remains unpaid. The defendant then has the burden of proving inability to pay in order to avoid a finding of contempt.[303] In *Knowles v. State*, the Mississippi court addressed the relationship between criminal prosecution for nonsupport and civil contempt for nonsupport.[304] Rejecting the defendant's double jeopardy argument, the court held that, since the purpose of the contempt action was enforcing the support payment obligations, the action was for civil contempt and Knowles could be convicted for willful failure to support without violating the double jeopardy clause.[305]

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[301] *See* CLARK,, *supra* note 1, § 16.6, at 674. "If the primary purpose of [the] suit is to enforce the rights of private litigants, or if the penalty is to enforce compliance with a court order, then the contempt is civil." Common Cause of Mississippi v. Smith, 548 So. 2d 412, 415 (Miss. 1989).

[302] *See* CLARK, *supra* note 1 § 16.6, at 674.

[303] Clements v. Young, 481 So. 2d 263, 271 (Miss. 1985). *See* Redding v. Redding, 150 So. 776, 776 (1933); Ramsay v. Ramsay, 87 So. 491, 493 (1921). *But see* Barfield v. State, 749 So. 2d 331 (Miss. Ct. App. 1999). The court of appeals refused to overturn a contempt citation. The father argued that the $83,000 amount in arrears should be voided because he was clearly unable to pay the agreed $1000 a month child support as he was unemployed for much of the time. The court noted that Barfield had agreed to the child support with knowledge of his circumstances and had failed to take the proper steps, i.e., to file a petition for modification. *Barfield*, 749 So. 2d at 339-41.

[304] *Knowles*, 708 So. 2d at 554.

[305] *Id.* at 554.

E. Locating an Absent Parent

Both the state and federal government provide a parent locator system for finding an absent parent. In operating the locator service, the Child Support Unit is authorized to obtain names and addresses of individuals and their employers from public utilities and cable television companies. The information may be obtained by adminstrative subpoena without a court order.[306] The Child Support Unit may also administratively subpoena financial information "from any individual, financial institution, business or other entity, public or private, needed to establish, modify or enforce a support order."[307] The recipient of a subpoena must provide the Child Support Unit with information about employment and employment related benefits, including medical insurance.[308] The Child Support Unit has access to records of the Mississippi Employment Security Commission. In addition, all state departments, agencies, and private employers must provide the Child Support Unit with verification of employment or payment and the address and social security number of any person upon the request of the Child Support Unit.[309]

Pursuant to federal mandate, Mississippi in 1999 established a directory of new hires to assist in parent location. Every employer doing business in the state is required to report to the department within fifteen days (a) the hiring of any person who resides or works in the state to whom wages will be paid or (b) the rehiring or return of any employee who was laid off, granted leave without pay, or terminated from employment. The report must include (a) the employee's name, address, social security number, and the date of birth; (b) the employer's name, address, and federal and state withholding tax identification numbers; (c) the date upon which the employee began or resumed employment; and (d) a copy of the employee's W-4 form or its equivalent.[310]

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[306] MISS. CODE ANN. § 43-19-45(1).

[307] MISS. CODE ANN. § 43-19-45(1) (including account numbers, names, and social security numbers of record for assets, accounts, and account balances).

[308] MISS. CODE ANN. § 43-19-45(1).

[309] MISS. CODE ANN. § 43-19-45(2).

CONCLUSION

The law governing child support awards and their enforcement has been substantially overhauled in the last fifteen years. The result mixes longstanding state common law principles with recently mandated, nationally generated rules and procedures. While common law principles still provide the basic framework for child support orders, indicating the source and duration of the duty and the parties to whom the duty applies and is owed, federally mandated guidelines determine the actual amount of the award. Modification proceedings are governed by a mix of pre-guideline and guideline rules, while enforcement efforts and tools are now largely the result of federal mandates. In the next decade, child support will probably be characterized by continuing federal involvement in state efforts to establish and collect support with increasing uniformity across state lines and expanded national systems for collection and enforcement.

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[310] MISS. CODE ANN. § 43-19-46. An employer is subject to a $500 penalty "if the failure is the result of a conspiracy between the employer and employee to not supply the required report or to supply a false or incomplete report." Otherwise, the penalty may not exceed $25. § 43-19-46.

"NECESSITY KNOWS NO LAW": VESTED RIGHTS AND THE STYLES OF REASONING IN THE CONFEDERATE CONSCRIPTION CASES

Alfred L. Brophy[*]

> How different may be the judgments of different minds equally astute when exercised upon precisely the same state of facts.
>
> Fredrick Grimke,
> *The Nature and Tendency of Free Institutions*[1]

On December 7, 1863, Jefferson Davis sent his annual message to the Confederate Congress. Davis lamented the reversals of fortune of the Confederate military the previous summer. He believed that in light of "the large conscription recently ordered by the enemy and their subsequent call for volunteers, to be followed if ineffectual by a still further draft . . . no effort must be spared to add largely to our effective force as promptly as possible."[2] One effort he proposed was an expansion of the draft of 1862.

Under the 1862 draft, men subject to service could pay another to serve for them. Davis suggested that the principals—the men who provided substitutes—be liable for service themselves. In early 1864, the Confederate Congress passed such a law.[3] Principals immediately challenged the law in the state courts of the Confederacy as a violation of their vested rights. The principals argued that they had a contract with the government to permanently exempt them from service, which the Confederate Congress could not constitutionally abrogate. Supreme courts of five Confederate states issued opinions on the act; all rejected the challenges.[4]

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[1] FREDRICK GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 451-52 (1837).

[2] *See* 1 MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY 345, 369 (James D. Richardson ed., 1966).

The published opinions, from Virginia, North Carolina, Georgia, Alabama, and Texas provide a unique opportunity to assess the almost simultaneous approaches of different state courts towards vested rights. This essay is the story of those five opinions and how the judges came to write the opinions that they did. It examines the relationship between the political affiliation of the judges who wrote the opinions and their reasoning and thus responds to the debate among legal historians over the degree to which the styles of reasoning employed by judges correlated with their political and social background.

The arguments used by the five former Democrats and three moderate Whigs who filed opinions involved the radical doctrine that the state had reserved the right to do whatever necessary in time of emergency. It was largely the Democratic judges who adopted extreme positions to protect the states against the federal government, as well as states against corporations. The two former Whigs who wrote opinions analyzed the problems differently. One, who filed a dissent, explicitly denied the power of the state to do whatever necessary; another analyzed the issues in terms of the common law of contract, not the grand constitutional power of a state to act in an emergency.

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[3] The Act provided:

> Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms:
> *The Congress of the Confederate States of America* do enact, That no person shall be exempted from military service by reason of his having furnished a substitute; but this shall not be so construed as to affect persons who, though not liable to render military service, nevertheless furnished substitutes.

Act of Confederate Congress, January 5, 1864, 6 JOURNALS OF THE CONFEDERATE STATES OF AMERICA CONGRESS 499 (House vote); 3 *id.* 561 (Senate Vote); 3 WAR OF THE REBELLION, OFFICIAL RECORDS, ser. 4, 12 (hereafter OR).

[4] *See* Burroughs v. Peyton, 57 Va. 470 (1864); Daly v. Fitzgerald, 34 Ga. Supp. 85 (1864); Ex Parte Tate, 39 Ala. 254 (1864); Gatlin v. Walton, 60 N.C. 310 (1864); Ex Parte Mayer, 27 Tex. 715 (1864).

This essay identifies the strands that came together in the opinions, such as constitutional doctrines related to power of the state and to contracts. Part I frames the debate over legal historians' interpretations of how judges in the first half of the nineteenth century decided cases—and how the judges articulated what they were doing. The remainder of the essay tells the story of how the Confederate state court judges came to write their opinions. The first part of the story involves the development of the belief that protection of society from social upheaval is a paramount goal of government. Part II suggests ways in which the argument that there were certain rights that no state could ever give up—such as the right to protect itself against danger—related to legal arguments in the South in the antebellum era. Part III suggests ways that values of the Whig and Democratic parties influenced the approach of courts towards government interference with contracts. It further suggests a connection between arguments that certain state powers were inalienable and the approach of certain radical Southern justices towards cases involving contracts between states and corporations.

Part IV examines the confluence of the strands of inalienable power and contracts jurisprudence in the Confederacy. It discusses the political background to the call to arms of principals who had provided substitutes. Then, after describing the political conflict, it turns to an examination of the five opinions and attempts to link the types of arguments used to the ideological orientation of the judges. Finally, it draws some conclusions about the nature of political ideology on constitutional law in the Confederacy.

I. REASONING STYLES IN THE ANTEBELLUM JUDICIARY

Thomas R. R. Cobb wrote on the first page of his treatise *The Law of Slavery* that "[p]hilosophy is the handmaid, and frequently the most successful expounder of the law. History is the groundwork and only sure basis of philosophy. To understand aright, therefore, the law of Slavery, we must not be ignorant of its history."[5] Legal historians perennially debate the factors that influence the ways that judges decide and, perhaps even more importantly, how judges explain their decisions to the public. Following the path-breaking work of Karl Llewellyn, whose 1960 book *The Common Law Tradition* labeled the predominant style of judges in the antebellum era the "grand style," legal historians have shown that judges in that era routinely rejected precedent in favor of reasoned re-examination of legal rules.[6] More recently, such constructs as "republicanism," "liberalism," and "ideology" have been proffered to explain constitutional and private law decisions. Writers with such diverse views as Morton J. Horwitz,[7] Duncan Kennedy,[8] Stephen Siegel,[9] G. Edward White,[10] and William

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[5] THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES xxxv (Philadelphia, 1858). On history in nineteenth-century jurisprudence, see PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 165-69 (1965); Michael Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986) (discussing mid-nineteenth century ideas, particularly of South Carolinians, about relative importance of history and science in law). *Cf.* Howard Schriber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999).

[6] KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 43-45 (1960).

[7] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1760-1860, esp. chap. 1 (1977) (demonstrating that judges adopted "instrumental" approach to deciding cases); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (discussing various strands of republicanism and liberalism).

[8] Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN L. & SOC. (1980).

[9] Stephen Siegel, *Understanding the Nineteenth-Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986). *See also* Mortimer Sellers, *Liberalism, Republicanism,*

E. Nelson[11] have expended their considerable analytic talent to map out the connection between judges' ideology and background and the arguments those judges brought to bear on legal issues.

Brooding above all of the recent debate on reasoning style are the writings of Professors Morton J. Horwitz and Duncan Kennedy. Professor Horwitz in particular shows that an "instrumental conception" emerged in judicial thinking, particularly in the 1830s and 1840s. Judges self-consciously altered legal rules to promote economic development. Professor Horwitz's thesis has been subject to some of the most searching criticism of any recent American historiography; many question his primary thesis—that judges conceived of law instrumentally to conform to their own economic beliefs.[12] The instrumental style, which Professor Kennedy calls preclassical legal thought, was composed of a vibrant investigation by judges of the rational for a legal rule, an investigation of the history and policy underlying particular choices, and a desire by judges to effect particular pro-business results. Judges, thus, rejected mere reliance on precedent in favor of a search for rules that comported with their current political and economic beliefs.[13]

Stephen Siegel's nuanced monograph on the Contracts

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and the Law, 86 KY. L.J. 1 (1997-98).

[10] G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 (1988) (examining the Marshall Court in its social and cultural context).

[11] William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America,* 87 HARV. L. REV. 513 (1974).

[12] *See, e.g.*, A.W. Brian Simpson, *The Horwitz Thesis and the History of Contracts,* 46 U. CHI. L. REV. 533 (1979) (explicitly challenging Horwitz's interpretation of contract law); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989) (questioning extent to which judges altered tort law); John Phillip Reid, *A Plot too Doctrinaire*, 55 TEX. L. REV. 1307, 1310-11 (1978) (questioning Horwitz's instrumentalism thesis and suggesting that new law may have resulted merely from the fact that new questions were being asked as a result of expanding economy); *cf.* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 585-87 (1993) (portraying Kent's *Commentaries* as part of the Institute tradition, which sought to order American law).

[13] *See* HORWITZ, *supra* note 7, chap. 1; Kennedy, *supra* note 8, at 5-6.

Clause in the nineteenth century suggested that the various interpretations of the clause resulted from shifting interpretations of the scope of protection that the Constitution conferred on private property, as well as differing jurisprudential attitudes of judges deciding appeals.[14] Harnessing the concept of ideology, William Fisher has recently explored the connection between religion and vested rights. He suggests that much of the connection may be attributable to the political affiliations of the judges as Whigs—and from the religious beliefs of those Whigs. Even those judges who were Democrats, rather than Whigs, may have adopted the reasoning styles first popularized by Whigs. Whig ideology is, therefore, central to Professor Fisher's explanation of reasoning style in the antebellum courts.[15]

William Nelson, on the other hand, posits that antebellum judges adopted the grand style of reasoning as a way of "effectuat[ing] socially desirable policies."[16] After the Civil War, according to Nelson, the grand style, which had been associated in the public mind with proslavery law, was rejected in favor of a formalistic approach. Nelson's analysis has been challenged by Harry Scheiber. Professor Scheiber, who considered reasoning style in vested rights cases, demonstrated that an instrumental conception appeared in opinions throughout the nineteenth century. According to Scheiber, judges ruled that "vested property rights could be abridged, often dramatically, if economic-growth goals established by the commonwealth dictated that they should yield."[17]

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[14] Professor Siegel wrote, for example, that "the pattern of inalienable power adjudication did not follow from a continual elaboration of a single, consensus viewpoint. . . . Rather, it was the result of controversy and of shifts and compromises in dominant opinion." Siegel, *supra* note 9, at 47. He further explains that the "pattern was shaped . . . by the aspects of nineteenth-century social and legal thought." *Id.* at 55.

[15] *See* William W. Fisher, III, *Ideology, Religion and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 134 (1990).

[16] Nelson, *supra* note 11, at 514. For a response to Nelson, see Alfred L. Brophy, *"over and above . . . there broods a portentous shadow,—the shadow of* law"*: Harriet Beecher Stowe's Critique of Slave Law in* Uncle Tom's Cabin, 12 J. L. & RELIGION 457, 499-504 (1997) (arguing that proslavery legal thought was more frequently foormalist than instrumentalist). Post-war formalism might have owed more to the country's retreat to conservatism—to its rejection of reasoning based on grand moral absolutes—than to its rejection of proslavery instrumentalism.

Even more recently, a series of scholars are proposing a counter-hypothesis to Horwitz's hypothesis that judges altered the law to promote economic growth.[18] The loosely associated newer group argue that judges were motivated by sentimental concern for plaintiffs and therefore altered the law to promote the welfare of those who had been injured. At the core, they argue that judges often respected precedent, but that on the occasions when judges departed from it, they often acted to limit the power of the wealthy. Judges followed, so the argument goes, a jurisprudence of the heart. While adherents of Horwitz' position as well as his opponents disagree on the direction jurists moved in, most seem to agree that judges were influenced by the principles being "debated all around them."[19] A consensus seems to be emerging that judges recrafted the law to comport with their ideas about economy, society and religion.

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[17] Harry Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1, 12. *See also* Harry N. Scheiber, *Book Review*, 107 YALE L.J. 823 (1997) (reviewing WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1997)).

[18] *See, e.g.,* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997); Thomas C. Clark, *The Impact of Nineteenth Century Missouri Courts upon Emerging Industry*, 63 MO. L. REV. 51 (1998); Mark E. Steiner, *Lawyers and Legal Change in Antebellum America: Learning from Lincoln*, 74 U. DET. MERCY L. REV. 427 (1997). For a recent critique of Karsten, see LAWRENCE FRIEDMAN, *Losing One's Head: Judges and the LaW in Nineteenth-Century American Legal History*, 24 LAW AND SOCIAL INQUIRY 253-79 (1999). Horwitz's paradigm continues to hold strong power. *See, e.g.,* TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 (1999). The nineteenth century respect for creativity among judges, which Susanna Blumenthal has recently described, bears a close resemblance to Horwitz's instrumentalism as well. *See* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151 (1998).

[19] KARSTEN, *supra* note 18, at 11. For a critique of Karsten, which points out the centrality of a brand of "instrumentalism" in recent interpretations of nineteenth century American law, see Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1207-1212 (1999).

The treatise writers told their readers—and therefore us as well—what the grand style meant to them. It required an understanding of the principles underlying the decision. Thomas R.R. Cobb believed one could not understand slave law until one understood its context. South Carolina lawyer James Walker wrote in his 1850 treatise *An Inquiry into the Use and Authority of Roman Jurisprudence in the Law Concerning Real Estate* that "the best preparation by the bench and the bar, for the correct application of a rule, is an accurate knowledge of its true ground; 'for then are we said to know the law, when we apprehend the reason of the law.'"[20] "Jurisprudence is the knowledge of laws, their reasons, and their sources. Knowledge of laws and their sources constitutes the history of the law," wrote Walker in his 1852 book, *A Theory of the Common Law*. One must understanding the history of the rule, "'for though a man can tell the law, yet, if he know not the reason thereof, he shall soon forget his superficial knowledge.'"[21]

Chancellor Kent provided one of the most explicit statements of the role of the judge in the grand style. He thought that

> a very large proportion of the matter contained in the old reporters . . . has been superseded, and is now cast into the shade by the improvements of modern times; by the disuse of real actions, and of the subtleties of special pleadings . . . by the growing value and variety of personal contracts; by the spirit of commerce, and the enlargement of equity jurisdiction; by the introduction of more liberal and enlightened views of justice and public police; and, in short, by the study of the civil law.[22]

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[20] JAMES M. WALKER, AN INQUIRY INTO THE USE AND AUTHORITY OF ROMAN JURISPRUDENCE IN THE LAW CONCERNING REAL ESTATE 45 (Charleston, S.C., 1850).

[21] JAMES M. WALKER, A THEORY OF THE COMMON LAW 5 (Boston, 1852).

[22] Kent's COMMENTARIES *453-54. *See also id.* at 443-44 (attack on reliance on precedent).

Everywhere one looks in antebellum legal writings, there were expressions of the importance of reason, history, and precedent in formulating legal rules. When the Philadelphia lawyer Charles Jared Ingersoll delivered a speech on the *Influence of America on the Mind* he reserved a special place for law. Hugh S. Legaré's review of Kent's *Commentaries* affirmed the sacred place of law in America; drawing on Ingersoll's ideas, Legaré celebrated the law as the place where Americans had made their contribution to learning.[23] That search for new monuments to guide them in formulating rules was part of the search for principles that took place throughout American society. Ralph Waldo Emerson expressed the sentiments of the nation asked in his essay *Nature*, "Why should we not also have an original relationship with the Universe?" Americans, expressing the optative mood, energetically reexamined the doctrines, laws, and literature of their ancestors. They came to believe, with Emerson, that "There are new lands, new men, new thoughts." It was natural, then, for them to "demand our own works and laws and worship."[24]

Judges, too, explained their mode of reasoning. Often they wrote about reason and experience as their guides. One Kentucky jurist explained his adoption of a rule in terms of both precedent and reason. "These decisions, we still approve, and suppose they are founded on principles which cannot be subverted, and to be sustained by reasons which cannot be refuted."[25] Or they sometimes wrote merely of the rule as "supported by reason and confirmed by authority."[26] A logical approach dominated their thought—reasoning from analogy. Experience was what they sought. In some cases, they explained in detail their analysis. One Kentucky jurist, for example, drew upon the language of the Constitution, the circumstances surrounding its adoption, and experience since the framing, to understand the Contracts Clause. His extensive opinion illustrates the paths of understanding, the sources of law, that converged in his mind.[27]

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[23] [Hugh S. Legaré], *Kent's Commentaries*, 2 SO. REV. 71 (1828).

[24] Ralph Waldo Emerson, *Nature* in 1 EMERSON: ESSAYS AND LECTURES 7, 7 (Joel Porte ed., 1983). *See also* Alfred L. Brophy, *Progress and the Idea of Law in Antebellum Phi Beta Kappa Lectures* (University of Illinois Law School Faculty Colloquium, November 11, 1999).

[25] Bodley v. Gaither, 21 Ky. 97 (1827).

[26] State v. Petway, 55 N.C. 396, 407 (1856). *See also* Gaines v. Burford, 31 Ky. 481, 488 (1833).

The grand style, which entailed a discussion of the underlying reasons for legal rules, was a mode of argument, a way of convincing others, a way of operating that was common to the jurists of the early nineteenth century. Through that mode of operating, judges brought their own ideas into the formal law. This paper now turns to what those ideas were and then examines the reasoning style of judges during the Confederacy.

II. CONSTITUTIONAL THEORY: POLICE POWER AND SOCIAL STABILITY

The most important weapon in support of conscription was the belief that a state can do whatever is necessary in time of crisis to protect itself against danger. That "necessity" argument has a firm grounding in antebellum society. This section recovers the context in which the judges decided the conscription cases by examining the concern over a state's powers to protect itself against danger and to protect a state against exploitation by corporations.

A. *Social Stability and Constitutional Theory*

> Liberty, indeed, though among the greatest of blessings, is not so great as that of protection; inasmuch, as the end of the former is the progress and improvement of the race,—while that of the latter is its preservation and perpetuation. And hence, when the two come into conflict, liberty must, and ever ought, to yield to protection; as the existence of the race is of greater moment than its improvement.[28]

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[27] Lapsley v. Brashears, 14 Ky. 46, 64-87 (1823) (Mills, concurring).

[28] JOHN C. CALHOUN, DISQUISITION ON GOVERNMENT 55, in 1 THE WORKS OF JOHN C. CALHOUN (Richard K. Cralle ed., 1851-1856) (hereafter DISQUISITION).

A vital strand in the response to the exigencies of civil war was the belief that the state could do whatever it needed to protect itself in time of danger. This belief correlated closely with the Southern experience in the antebellum era. Beginning in the 1820s Southerners lived in a world of fear of social upheaval. They were surrounded by blacks, a source of potential rebellion, as well as Northerners who, when they were not threatening to end slavery, seemed to be increasing control over the states through the federal government.[29] Southerners developed a philosophy based on the inequality that surrounded them, which argued that social stability was the highest goal of the state.

William and Mary professor George Frederick Holmes provides a window into the Southern belief that society can function only when there is stability. In his vicious essay review of *Uncle Tom's Cabin*, Holmes attacked what he identified as the thesis of Stowe's novel: that slavery "ought to be universally condemned, and consequently abolished immediately" because it has produced the evil that Stowe documents and is, therefore, "a violation of all the laws of Nature and of God."[30] Such a philosophy, Holmes raved,

> strikes at the very essence and existence of all community among men, it lays bare and roots up all the foundations of law, order, and government . . . . Pandemonium itself would be a paradise compared with what all society would become, if this apparently simple and plausible position were tenable, and action accordingly regulated by it.[31]

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[29] *See generally* WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836 (1966); J. MILLS THORNTON, POWER AND POLITICS IN A SLAVE SOCIETY: ALABAMA, 1800-1860, xv-xviii (1978).

[30] G.F. Holmes, *Review of Uncle Tom's Cabin*, 18 S. LIT. MESSENGER 721-31 (1852), reprinted in SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 99, 103 (Eric L. McKitrick ed. 1963).

[31] *Id.* at 104-05. *See also* WILLIAM HARPER, MEMOIR ON SLAVERY (Charleston, S.C. 1838), *reprinted in* THE PROSLAVERY ARGUMENT (Charleston, S.C., 1860) and in THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860 78, 87 (Drew Gilpin Faust ed., 1981).

Arguments of this ilk appeared in formal constitutional theorizing about slavery as well as in popular literature. The constitutional theory of John C. Calhoun, the radical South Carolina theorist, for example, promoted social stability. Slavery served as a way of maintaining stability among the whites of all economic strata. Calhoun developed his theory as a way of acquiring a universal white upperclass. "With us," Calhoun said on the Senate floor in 1848, "the two great divisions of society are not the rich and the poor, but white and black; and all the former, the poor as well as the rich, belong to the upper class."[32]

In his *Disquisition on Government*, his final statement of political philosophy published posthumously in 1851, Calhoun built his theory of government upon three related principles: the inherent desire of individuals to place their own well-being above that of society, "the great law of self-preservation," and inequality of people.[33] Calhoun thought that the goal of government was to channel those selfish desires; government had to restrain individuals in order to "protect and to perfect society." Such protection and perfection required an appropriate balance of liberty with restraint. "For to extend liberty beyond the limits assigned, would be to weaken the government and to render it incompetent to fulfill its primary end—the protection of society against dangers, internal and external."[34]

For the state to prosper, it had to harness the inherent inequality of people. One way to harness the inequality was to give government the power to protect itself by compelling obedience from its citizens, as well as service in the military. Chancellor William Harper of South Carolina developed the inequality theory in a pamphlet published in 1837. Harper based much of his proslavery argument on the proposition that humans do—and are morally justified in doing—whatever necessay in self-defense. Harper infused a pessimism about society into his political theory, based on his beliefs about human behavior. "Man is born to subjection" and people remain in a form of subjection throughout their lives. This maxim of social hierarchy and the need to restrain people in their "pursuit of happiness" were immutable, he thought: "So it has been since the days of Nimrod."[35]

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[32] 4 CALHOUN'S WORKS, *supra* note 28, at 505-06.

[33] CALHOUN, DISQUISITION, *supra* note 28, at 3-4.

[34] *Id.* at 52. *See also* Abel Upshur, *Domestic Slavery as it Exists in Our Southern States, with Regard to Its Influence upon Free Government*, 5 SO. LIT. MESSENGER 677-87 (1839) (discussing influence of slavery on democracy).

Albert Bledsoe's philosophical essay *Liberty and Slavery*, written while he was teaching at the University of Virginia, further illustrates the Southern concern for protection of stability of the state and its religious basis.[36] God, Bledsoe believed, dictated natural law and the state should use law to require individuals to follow natural law. He argued that law facilitates human society by restraining individuals from violating natural law.

Bledsoe began his 150 page essay by arguing that—contrary to the beliefs of such philosophers as Locke and Hobbes—law does not limit natural rights. According to Bledsoe, both Locke and Hobbes had erred when they stated that the state restrained natural liberty. Locke's error was his belief that people had to give up natural liberty to the state; Hobbes' was his belief that the state was necessary to restrain individuals' passions and thus preserve liberty. Instead, Bledsoe believed "the law which forbids the perpetuation of mischief, or any other wrong, is a restriction not upon the *liberty*, but upon the *tyranny*, of the human will."[37] His "correct" view of human society held that God established the natural right to freedom from anarchy. How well liberty was preserved depended, then, upon the state's preservation of natural rights through law:

> The truth is that in a state of nature, we would possess

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[35] WILLIAM HARPER, MEMOIR ON SLAVERY (Charleston, SC, 1837), reprinted in IDEOLOGY OF SLAVERY, *supra* note 31, at 78, 83, 85.

[36] Albert Taylor Bledsoe, LIBERTY AND SLAVERY, OR SLAVERY IN THE LIGHT OF MORAL AND POLITICAL PHILOSOPHY, in COTTON IS KING AND PROSLAVERY ARGUMENTS 271 (E.N. Elliot ed., Augusta, Ga., 1860).

[37] *Id.* at 278.

> rights, but we could not enjoy them. That is to say, notwithstanding all our rights, we should be destitute of freedom or liberty. Society interposes the strong arm of the law to protect our rights, to secure us in the enjoyment of them. She delivers us from the alarms, dangers, and the violence of the natural state . . . .
>
> Good government it is that restrains the elements of tyranny and oppression, and introduces liberty into the world. Good government it is that shuts out the reign of anarchy, and secures dominion of equity and goodness. He who would spurn the restraints of law, then, by which pride, and envy, and hatred, and malice, ambition, and revenge are kept within the sacred bounds of eternal justice—he, we say, is not the friend of human liberty.[38]

All of his groundwork went to show that the abolitionists were destroying the well-ordered American society. Slavery, rather than restraining the natural liberties of the slaves, Bledsoe thought, "really shuts out the most frightful *license* and disorder from society." That disorder would be the downfall of American liberty.

Bledsoe's defense of slavery fit well within the Southern beliefs about slavery and the constitutional defense of slavery. Bledsoe echoed and provided a justification for the popular belief that government should promote stability. He mixed that belief with an argument that society benefitted from slavery and that without slavery there would be anarchy.

This Southern ideology reached its apex during the Confederacy. Confederates carefully distinguished their revolution from prior radical uprisings, such as the French Revolution and made frequent calls for reliance upon traditional hierarchy and deference were common.[39] It is not surprising, therefore, to find the argument used frequently in the South during the war.

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[38] *Id.* at 284-85.

[39] DREW GILPIN FAUST, THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH 30-34 (1988); DREW GILPIN FAUST, JAMES HENRY HAMMOND AND THE OLD SOUTH: A DESIGN FOR MASTERY 40-43 (1982) (discussing conservative republicanism). *See also* T.R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY (Paul Finkelman, ed. 1999) (T. & J.W. Johnson, Philadelphia, 1858) (discussing proslavery legal thought).

The South was not, of course, homogeneous in its political values; but the republican principle of the subversion of individual interests to the public good was broad enough to encompass the vision of both Democrats and Whigs. Indeed, the organicist social philosophy of the South's defenders of slavery was driven by more than just slavery. As historian Drew Faust points out, the social ideas of proslavery writers were related to larger movements in nineteenth-century philosophy. Thus, proslavery ideas were closely allied to conservative British philosophers Matthew Arnold and Thomas Carlyle as well as the conservative Boston ministers who "were among slavery's harshest critics."[40]

Nevertheless, the Whigs and Democrats divided on their approach to constitutional law. While Democrats might be willing—as their President Andrew Jackson was—to brush aside constitutional issues in favor of expediency, Whigs were not. On issues from protection for vested rights to free speech, Whigs appeared more receptive than Democrats to refined constitutional arguments. The Whig tradition appears to have derived from lingering concerns over the effect of democracy on the Republic. A careful balancing of interests—state and federal and property against the landless—supported by the appropriate constitutional scruples was necessary to preserve liberty.[41]

B. Constitutional Theory into Practice

In the years leading up to the Civil War, lawyers and judges translated the popular beliefs that slavery served as a groundwork for society into formal constitutional law. In the opinions of the United States Supreme Court and, more often, in arguments before the Court, as well as in the state courts and in debates in Congress one can see legal principles emerging around the argument that a state could not give up the right to protect itself against danger. That principle was commonly called the police power.

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[40] *See* DREW GILPIN FAUST, A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH, 1840-1860, 130 (1977); MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF chap. 11 (1957) (fears of declining morality appeared in both North and South). *See also* Alfred L. Brophy, *"A Revolution which seeks to Abolish Law, must end necessarily in despotism": Louisa McCord and Antebellum Southern Legal Thought*, 5 CARDOZO WOMEN'S L.J. 33 (1998) (discussing Louisa McCord's proslavery thought).

[41] *See* LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA, chap. 4 (1989); WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 10, chap. 5.

The way in which the abstract theory that lay at the basis of Southern political theory—the belief that the first goal of government was the protection of stability—was translated into constitutional law is illustrated by two crises.

The 1836 Congressional debate over the distribution of abolitionist literature through the United States mails provides another illustration of the application of such ideas. In the spring of 1835, the New York-based American Abolitionist Society, began using the United States mails for a massive mailing campaign to distribute unsolicited copies of its tracts to prominent southerners. When the first such mailing arrived in Charleston, South Carolina in May 1835, the literature was burned in the post office. Soon, however, South Carolinians proffered a legal defense of suppression.[42]

John C. Calhoun, the foremost Southern proponent in Congress, established a Southern-dominated committee in the Senate to study the problem. The Committee studied various solutions, including President Jackson's drastic proposal of a federal law prohibiting literature that *Congress* found offensive.[43] The Committee report (written largely by Calhoun) argued that no state had surrendered its most basic right—the ability to protect itself against external danger. Therefore, each state could exclude any literature it wished.[44]

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[42] For extended discussion of the abolitionist literature crisis, see Alfred L. Brophy, "Like the Serpent into the Garden of Eden": Abolitionist Literature and Southern Constitutional Theory (unpublished paper); FREEHLING, *supra* note 29, chap. 8.

[43] 3 MESSAGES AND PAPERS OF THE PRESIDENT, 175-76 (James Richardson ed., 1897); 5 CORRESPONDENCE OF ANDREW JACKSON 360-61 (Aug 9, 1835) (John Spencer Bassett ed., 1926).

[44] Report of the Select Committee on Abolitionist Literature, 13 PAPERS OF

Another example of the application of abstract philosophical ideas comes from the interstate slave trade. In the 1830s Mississippi adopted a new constitution, which prohibited anyone from bringing slaves into the state for sale. The prohibition was challenged as an interference with the interstate commerce clause. The majority opinion in *Groves v. Slaughter* decided the case on technical grounds, but Justice Thomas McLean's concurrence strongly indicated that police power supported Mississippi's exclusion. He wrote:

> Each state has a right to protect itself against the inconveniences and dangers of a slave population. The right to exercise this power, by a state, is higher and deeper than the constitution. The evil involves the prosperity, and may endanger the existence of a state. Its power to guard against, or to remedy the evil rests upon the law of self-preservation; a law vital to every community, and especially a sovereign state.[45]

Thus, the right of a state to protect itself against danger had deep roots in antebellum law. Cases such as *Groves* provide a concrete connection between abstract arguments and the response of Confederate judges who faced the question of how to deal with the conscription cases.

III. CONTRACTS CLAUSE JURISPRUDENCE

A second strain of thinking leading to the conscription cases involved the Contracts Clause of the United States Constitution. That clause provides that no state shall impair the obligation of contracts. In the antebellum era, the contracts clause was a crucial way of protecting private property against encroachment by the government. The clause, therefore, occupied a central position in debates over competing visions of the

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JOHN C. CALHOUN 52 (1836) (Clyde Wilson ed., 1983). Calhoun believed that when the federal government's asserted its right to judge its national powers, free from state checking that "the cord was touched which roused [the abolitionist crisis] into action." DISCOURSE, *supra* note 28, at 373.

[45] *Groves*, 40 U.S. (15 Pet.) 449, 507 (1841). *See also* 2 ALEXANDER STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 67, 571-72, 781-90 (1868) (discussing *Groves*).

role of corporations and established wealth in American society.[46]

In cases involving attempts by states to infringe on contracts they had made with corporations, courts developed a body of doctrine around the belief that states should be protected against corporations. Democratic jurists construed legislative grants narrowly, construed the scope of the contracts clause narrowly, and, in extreme cases, held that there were certain powers that the state could not grant away. Thus, two elements—the right of a state to protect itself and opposition to established wealth—combined to produce a new approach to vested rights in contracts clause cases by the middle of the nineteenth century.

A. Democratic Suspicions of Corporations

From 1836 until the Civil War the United States Supreme Court was dominated by Democratic justices and chief among them was Roger B. Taney. President Andrew Jackson appointed Taney chief justice in 1836 to fill the vacancy left by John Marshall's death in 1835. Taney's contemporaries believed that he represented a shift towards increased control by the Democrats—and increased application of Democratic principles—on the Court.[47]

Taney's contemporaries predicted that he would guide the Court toward increased suspicion of corporations. There was substantial evidence from other Democrats of the suspicion of established wealth. President Andrew Jackson's Farewell message succinctly canvassed the spectrum of Democratic beliefs, including fear of corporations. In writing about banks, Jackson warned that "unless you become watchful . . . and check this spirit of monopoly . . . you will in the end find that the most important powers of Government have been given or bartered away, and the control over your dearest interests has passed into the hands of these corporations."[48] Under Taney's care, the Supreme Court translated the views of the Democratic party into formal constitutional law, especially in the area of the Contracts Clause.[49]

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[46] *See* Siegel, *supra* note 9.

[47] For reaction of politicians to Taney's appointment, see CARL SWISHER, THE TANEY PERIOD, 1836-1864 30-38 (1974). *See also* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 218-20 (1985) (discussing Story's reaction to Taney).

B. Methods of Limiting the Contracts Clause

The Supreme Court restricted the Contracts Clause in several ways. The most common way was the narrow construction of grants, followed by the narrow application of the Contracts Clause. The most controversial doctrine, subscribed to by only a minority of justices, held that states could not part with the most important of their sovereign powers, such as the right to eminent domain.

1. Narrow Construction of Grants

The primary mode of limiting the Contracts Clause was the narrow construction of government grants. Chief Justice Taney introduced the narrow construction principle in his opinion in *Charles River Bridge v. Warren Bridge*. In that case, the proprietors of a bridge spanning the Charles River, who had received a charter from the state of Massachusetts, sued to prevent the chartering of a nearby bridge. The proprietors of the first bridge argued that the chartering of the new bridge violated an implied condition that they would have a monopoly. Justice Taney's approach advocated deference to legislative wishes and emphasized that a sovereign legislature did not contract away its rights lightly.[50]

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[48] MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 1, 16, at 306. On the differences between Whigs and Democrats on vested rights, contrast [James Kent], *Supreme Court of the United States*, 2 NEW YORK REV. 372 (1838) and [Charles Ingersoll], *The Supreme Court of the United States*, UNITED STATES MAG. & DEM. REV. 497, 503 (1840). On a more literary level, one might also contrast HEMAN HUMPHREY, DISCOURSE DELIVERED BEFORE THE CONNECTICUT ALPHA OF Φ. B. K. AT NEW HAVEN, AUGUST 14, 1838 (New Haven, Hitchcock & Stafford, 1839) with JOSEPH INGERSOLL, AN ADDRESS DELIVERED BEFORE THE PHI BETA KAPPA SOCIETY, ALPHA OF MAINE IN BOWDEN COLLEGE 13 (Brunswick, 1837) and GEORGE BANCROFT, AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD . . . JULY 4, 1836 5 (Springfield, 1836).

[49] There is no biography of the Taney Court that places it within its historical context in the way that G. Edward White's stunning volume places the Marshall Court in its. Nevertheless, there much recent scholarship points out ways in which the Taney Court was influenced by—and adopted the perspective—of its predominantly Democratic justices. *See generally* SWISHER, *supra* note 47, at 128-45; Alfred L. Brophy, Note, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192 (1990) (locating Court's federalism decisions in the context of antebellum political thought).

Justice Joseph Story's dissent, on the other hand, illustrates an alternative vision of Contracts Clause jurisprudence. Story, a prominent Massachusetts Whig, one of the most respected jurists of his time, and author of influential treatises on various aspects of law from contracts to the Constitution, proposed a broad reading of the charter, which would have fulfilled the expectations of the proprietors of the first bridge. Chancellor Kent voiced concern over the implications of the decision in a letter to Story. If the "legislature can quibble away contracts . . . can the People be far behind?"[51] At base was a difference in political visions. Story's conservative Whig tradition impelled his opposition to the legislature interfering with individuals' property rights, which were necessary, in his view, to maintain a democratic government.[52] The difference between the Story and Taney opinions is in the mode of constitutional interpretation. Taney wanted to construe strictly and he does so because of the nature of the legislature in relationship to the people. Story construes broadly because the people have spoken and fairness dictates treating government grants like any other contract.[53]

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[50] *See also* Ohio v. Debolt, 57 U.S. 435 (1851); West River Bridge v. Dix, (6 How.) 507 (1848); Richmond, F. & P. R.R., 54 U.S. (13 How.) 71 (1851); Boston & S. R.R. v. Nesbit, 51 U.S. (10 How.) 395 (1851); Planter's Bank v. Sharp, 47 U.S. (6 How.) 301 (1848).

[51] NEWMYER, *supra* note 47, at 233.

[52] MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 398-400 (1987); MAURICE G. BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION, chap. 7 (1984).

[53] Eventually, the narrow construction of grants became a principle that all agreed upon. As Whig jurist Henry Lumpkin wrote in 1851, "if one principle is settled in this country beyond all hazard of a change, it is, that in grants by the public, nothing passes by implication." Shorter v. Smith, 9 Ga. 517, 524 (1851).

2. *Narrow Application of Contracts Clause*

The Contracts Clause was further limited by the Justices' application of the clause to only a narrow range of relationships. Thus, laws granting rights were construed as public laws, rather than contracts. In *Butler v. Pennsylvania*, for example, Justice Peter V. Daniel of Virginia held that a statute appointing canal commissioners for one year did not create a vested right for those commissioners. The state could replace the commissioners and lower their salaries whenever it wanted. Justice Daniel thought that the appointments created mere hopes, but did not create an enforceable contract.[54]

3. *Inalienable Powers*

Finally, some opinions held that a state could not alienate fundamental aspects of sovereignty, such as the right to eminent domain. A minority held that the state could not alienate other powers, such as the right to tax. This radical approach, which relied upon the belief that the states had certain sovereign elements that they would never part with, was advocated strenuously by Democratic Justices Peter V. Daniel of Virginia, John A. Campbell of Georgia, and John Catron of Kentucky.

The doctrine held that certain powers of a state were so fundamental that the state could not part with those rights. This was closely related to the Southern argument that states did not alienate the right to protect themselves in forming the United States Constitution.

The 1851 case *Debolt v. Ohio* illustrates the diversity of approaches of the Taney Court justices on the Commerce Clause. *Debolt* upheld the Ohio legislature's imposition of an increased tax on banks chartered after 1838. Chief Justice Taney narrowly interpreted the Ohio grant. He based much of the decision on the Ohio court's previous interpretations that the legislature could increase a tax on a bank. "The grant of privileges and exemptions to a corporation are strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms." He furnished another reason to narrowly interpret the legislature's grant:

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[54] Butler v. Pennsylvania, 51 U.S. (10 How.) 511 (1850). *See also* Town of East Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511 (Dec. 1850 Term); State of Maryland v. Baltimore & Ohio R.R. 44 U.S. (3 How.) 534 (1845).

> It is founded in principles of justice, and necessary for the safety and well-being of every State in the Union. For it is a matter of public history, which this court cannot refuse to notice that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of the session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner . . . .[55]

For Taney, fairness to the state compelled the narrow construction. In their concurrence, Justices Daniel, Catron, and Campbell took an approach explicitly disavowed by Taney, which led to the same result. Justice Catron wrote that Ohio could not part with its right to tax.[56]

In one case a majority of the Justices did subscribe to a view that a sovereign power was inalienable and that a charter restricting that sovereign power was invalid. In *West River Bridge v. Dix*, Justice Daniel had a rare opportunity to write for the majority; he held that all contracts have implied conditions, including the right of a state to eminent domain. Justice Daniel wrote:

> [I]t is undeniable that the investment of property in the citizen by the government . . . is a contract between the State . . . and the grantee; . . . But into all contracts . . . there enter conditions which arise not out of the literal terms of the contract itself; they are superintended by the pre-existing and

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[55] *Debolt*, 57 U.S. at 435.

[56] *Id.* at 443 (incorporating his dissent in *Piqua Bank v. Knoop*, 57 U.S. 392, 414-15 (1854), which argued that exemption of taxation was not irrevocable).

> higher authority of the laws of nature, of nations, or of the community to which the parties belong. . . . Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.[57]

Such a conclusion is not surprising; the federal government's right of eminent domain is guaranteed by the Fifth Amendment. And as long as the state paid adequate compensation, there would ordinarily be no violation of contracts problem.[58] But *West River Bridge* came to stand for a much more radical proposition; it was cited to show that certain sovereign powers could not be contracted away. The doctrine of implicit conditions became the doctrine that sovereignty could not be alienated.[59]

Dodge v. Woolsey, decided in 1856, was one of the, last expressions of the tension between vested rights and state sovereignty before the Civil War. The dissent shows the radical approach to states' rights and the power that radicals attributed to a state constitutional convention. For those radicals, the public good—as opposed to the good of the avaricious corporations—dictated the reservation of the right of sovereignty. The general public's good was the highest goal and when that good conflicted with individual interests, the public good triumphed. This was the dominant philosophy of the Confederacy exemption cases. Thus, it appears that the Democratic ethos accounted for certain developments in jurisprudence at the federal level. The limited evidence available also suggests that political affiliations of judges correlated closely with their approach towards vested rights.

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[57] *West River Bridge*, 47 U.S. (6 How.) 507, 532 (1848).

[58] Some Southerners disagreed with my characterization. They thought that slaves could not be taken away even if the government paid just compensation. Their theory was related to Justice Daniel's argument: that slavery was the basis of Southern society and that the government could do nothing to destroy society. *See* Thomas Roderick Dew, *Abolition of Negro Slavery, reprinted in* IDEOLOGY OF SLAVERY, *supra* note 31, at 39-42. A particular version of this doctrine held that the federal government could do nothing to hinder slavery because that would discriminate against the slave states in favor of the non-slave states. *See* Calhoun, *Resolutions on the Territories*, 4 CALHOUN'S WORKS, *supra* note 28, at 437.

[59] Professor Fisher suggests that the inalienable power argument derives from Whig thinking. He traces the development of the doctrine to the Whig ideology that courts—and political bodies in general—should select "common-law doctrines that simultaneously promote the common good and do justice in particular cases." See Fisher, *supra* note 15, at 112-13, 120. He sees the inalienable power doctrine, in turn, as promoting that general precept. While recognizing the importance of Whig ideology in general in shaping judicial doctrine, this paper suggests that Democrats were the most frequent wielders of the inalienable power doctrine in the middle of the century.

IV. CLASH OF CONSTITUTIONAL VIEWS: THE EXEMPTION CONTROVERSY

Against this backdrop, the Confederate Congress formulated—and the courts almost unanimously approved—the act to subject those who had provided substitutes for conscription.

A. The Act and Public Reaction

Two motives combined in the fall of 1863 to impel Jefferson Davis to propose the revamping of the Confederacy's conscription law. The first was a pressing need to expand the army. The Confederate military fortunes took a decided turn for the worse in 1863. Following defeats at Gettysburg, Vicksburg, and Port Hudson in July came the retreat from Tennessee in September, and the defeat at Chattanooga in November. The annual report of Secretary of War James Seddon issued in November 1863 accurately labeled the Mississippi campaign "disastrous." The Confederacy was inundated with reports of the Northern draft and unfavorable comparisons of the size of the Confederate and Union armies. Secretary Seddon charged that the substitution law depleted the army of perhaps 50,000 soldiers. He, therefore, proposed its immediate repeal.[60]

Davis' proposal was also the result of several years' dissatisfaction with the Confederacy's conscription program. When, in April 1862, the Confederacy enacted the first nationwide draft of the war, it granted broad exemptions and allowed anyone subject to the draft to provide a substitute. As the war took its toll, morale suffered as soldiers in the field served while their wealthy counterparts remained at home. The bill repealing the exemptions for those who provided substitutes was designed, the *Richmond Whig* reported, to quiet discontent among the soldiers because the wealthy had been allowed to avoid service. "A privilege such as the substitute law afforded was well calculated to excite jealously and discontent in the minds of the gallant men who bore the brunt of this conflict."[61] Mary Boykin Chestnut, the well-known barometer of Confederate opinion, recorded anger that some Floridians who had exemptions were profiting during the war. The image of the principal as a skulker pervaded Chestnut's thought. When she neglected to visit soldiers at the Richmond hospital, she thought that she knew "how men feel who hire a substitute and shirk the fight." In debates on the bill, Senator Louis Wigfall of South Carolina reminded Senators that "those who had fought under the suns of July and August and under the frosts of October and November, and were not yet buried, were discontented that their rich neighbors were not in the army to share their lot with them." Privately, Wigfall and Secretary of War Seddon charged that the opponents of the bill were "aiding the Yankees."[62]

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[60] *See* James Seddon to Jefferson Davis, November 26, 1863, 2 OR, Ser. IV, *supra* note 3, at 990, 995 (Northern draft will result in 300,000 men).

The Yankees who were being aided did not have the same problems surrounding conscription. Until July 1863, men subject to service in the North could purchase exemptions for three years for $300. Because the United States Congress spelled out exactly what the $300 purchased, the terms of the contract were clear. From July 1863 until the end of the war, men subject to service in the North could provide a substitute in their place. Many of the same concerns about fairness of conscription, however, emerged in the North. In July, 1863, just after Gettysburg, antidraft sentiment drove Irish immigrants in New

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[61] RICHMOND WHIG, Feb. 10, 1864; CHARLESTON MERCURY, Dec. 30, 1863 (bill passes House, influenced by Army sentiment).

[62] *See* MARY CHESTNUT'S CIVIL WAR 464-65, 641 (C. Vann Woodward ed., 1981). PROCEEDINGS OF THE CONFEDERATE CONGRESS, 49 SOUTHERN HISTORICAL SOCIETY PAPERS, 45-46; CONFEDERATE UNION, Jan. 12, 1864; CHESTNUT'S CIVIL WAR, at 517.

York city to riot. In excess of 120 people died in what remains some of the worst rioting in American history. Nevertheless, there was not the same stigma attached to purchase of a substitute in the North as in the South. Even the office of the Presidency was open to one who purchased a substitute, as Grover Cleveland demonstrated when he was elected in 1884.[63]

Judging by the amount of money spent on purchasing substitutes, the popular fears that the exemptions aided the wealthy had some basis in reality. Some anecdotal reports show that the principals spent as much as $5,000 to $6,000 on substitutes.[64] Debate over conscription was tinged by class conflict from the beginning. One Virginia resident warned Secretary of War James Seddon

> It is impossible to make *poor* people comprehend the policy of putting able-bodied, healthy, Mr. A. in such light service as collecting tithes and money at home, when the well known feeble & delicate Mr. B. — who is a poor man with a large family of children depending on him for bread — is sent to the front . . . . [T]he people will not always submit to this unequal, unjust and partial distribution of favor and wholesale conscription of the poor while the able-bodied & healthy men of property are all occupying soft places.[65]

The immediate public reaction to Jefferson Davis' proposal to eliminate the exemption was largely positive. The Charleston *Mercury*, writing while Charleston was in its 170th day of siege, rejoiced that the wealthy men who had bought their way out of service would at last be pulling their weight. The Mobile *Advertiser* was more emphatic. In the face of reports that the law was "creating a stampede among that class of Confederate patriots who have determined from the beginning to take no part in the great struggle for freedom which belongs to every individual who can fight or labor in the holy cause," the *Advertiser* offered a lesson to the men who "never learned . . . the obligations of allegiance and what they owe to society in return for the privileges which society has accorded to them." The *Advertiser* quoted the "books of International law to learn what these duties and obligations are." One of those books was Chancellor Kent's *Commentaries*. The paper noted that those who do not act to protect the government forfeit all "rights to the protection of the state, to life, liberty and property." It concluded by suggesting that the government should confiscate the property of those who did not serve.[66]

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[63] *See* JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 356-57, 360 (1982); HORACE SAMUEL MERRILL, BOURBON LEADER: GROVER CLEVELAND AND THE DEMOCRATIC PARTY 11-12 (1957).

[64] *See* PAUL D. ESCOTT, AFTER SECESSION: JEFFERSON DAVIS AND THE FAILURE OF CONFEDERATE NATIONALISM 118 (1978); 2 J.B. JONES, A REBEL WAR CLERK'S DIARY, 219 (Howard Swiggett ed., 1935).

[65] ESCOTT, *supra* note 64, at 119 (emphasis omitted).

There were fears that the principals would try to undermine the Confederate government by selling their securities and emigrating from the Confederacy. "An abquestration from the Confederate limits of numbers of gentlemen . . . may be looked for," thought one newspaper.[67] Despite those fears, there was little evidence of the "general exodus . . . to Yankeedom" that Virginia radical Edmund Ruffin thought that he detected. Instead, men were looking for favorable positions in the army.[68]

An important, vocal minority opposed the Act. Some cited practical reasons. One paper raised the specter that expanded conscription would leave few people to tend the farms and might lead to slave insurrection. South Carolina Senator John L. Orr, one of only two Senators to vote against the Act, whose speech opposing the act was widely discussed in Richmond, wrote to former South Carolina governor John Henry Hammond, asking if Congress expected "special interposition of Providence" to provide food for the Army as "God Almighty fed the Israelites."[69]

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[66] *See* [Mobile] ADVERTISER, Jan. 9, 1864.

[67] *See* [MOBILE] ADVERTISER, Jan. 7, 1864; CHARLESTON COURIER, Jan. 6, 1864; [MOBILE] ADVERTISER, Jan. 10, 1864.

[68] *See* 3 DIARY OF EDMUND RUFFIN 326 (William Kauffman Scarborough ed., 1989) (reporting "exodus" and bitterly claiming that the exodus would raise the morale level of the remaining Southerners). [MOBILE] ADVERTISER, Jan 12, 1864; CHESTNUT, *supra* note 62, at 540.

The most important opposition to revocation of the exemption came on constitutional grounds. Conscription itself was attacked as an unconstitutional interference with states' rights. In an editorial in March 1864 entitled "The Sovereign States vs. Their Servants," the *Richmond Whig* warned about the centralizing tendencies of the Confederate Congress. The editorial used conscription as an example of the unconstitutional infringement on the states' rights. "The centralizing influences of war are apt to lead us astray. Nothing should make us forget that the five or six citizens composing the Agency at Richmond are simply and subtly the servants of their sovereignties." Nevertheless, the *Whig* recommended that the constitutional problems be resolved at a constitutional convention *after* the war.[70]

Others urged vigilance now, rather than waiting for the end of the war. *Veritas*, writing in the Milledgeville, Georgia, *Confederate Union*, thought that

> passing events clearly portray the aim and object of a certain class of our public men; and with the lullabies of "conflict," "war upon the Administration," "whip the Yankees then fight for the Constitution and States Rights," "a strong government is necessary to our success," and a hundred other cajoling opiates, they hope to put vigilance to sleep, and accomplish by indirect, what they dare not attempt by open and direct means.

Veritas feared those people sought to establish a dictatorship.[71] The Charleston *Mercury* warned about the potential for loss of liberty from the proposals for consolidation of power, which were based on calls of military necessity:

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[69] *See* HILLSBORO [NORTH CAROLINA] RECORDER, Jan. 6, 1864, 2. On discussion of Orr's speech, see "Correspondence from Richmond," CHARLESTON MERCURY, Jan. 4, 1864. Orr to Hammond, Hammond Papers, Library of Congress, *quoted in* WILFRED B. YEARNS, THE CONFEDERATE CONGRESS 78 (1960).

[70] March 11, 1864. *See also* RICHMOND ENQUIRER, March 12, 1864 (editorial urges resolution of constitutional questions after the war) (reprinted from CHARLESTON MERCURY).

[71] *See* [MILLEDGEVILLE, GA.] CONFEDERATE UNION, May 16, 1864. *See also* CHARLESTON MERCURY, Jan. 5, 1864.

> It is a bad sign when, in place of the steady self-possession and calm exercise of wisdom displayed by the Roman Senate after the battle of Cannae, the recklessness of alarm and the desperation of demagogism show their presence to the Congress of the Confederate States. . . . Instead of going into wild revolutionary talk, like some that has been uttered, . . . Congress may bend its efforts to infusing competency and vigor into the bureaux and departments of the Administration . . . . Anything else is madness.[72]

There were quite specific constitutional objections to the revocation of exemption, as illustrated by a comprehensive editorial in the Petersburg *Express*, which was reprinted in the North Carolina *Hillsboro Recorder*, edited by a former Whig Unionist. The editorial suggested that the bill violated two contracts: that the principal had with the government and the one he had with the substitute. It was destined to "create in a very large portion of the people the greatest discontent." If the government can "repudiate one kind of contract it can repudiate another, and as necessity is the argument in the present case, necessity may . . . repudiat[e] any and every other engagement by which it may be bound."[73]

Despite those objections, the overwhelming weight of public opinion was behind the act. When the Confederate Congress took up debate on the Act in December 1863, it proved extremely popular. Secretary of War Seddon tried to head off any constitutional claims when he initially proposed revocation of exemption in November 1863. He argued that the exemption was merely a privilege for which the substitute should have been grateful. Moreover, he thought that the privilege of exemption only extended to a single call to duty; one could never be permanently exempted from "the paramount duty, ever incumbent upon every citizen, as a patriot solider, to defend his country." Jefferson Davis echoed Seddon's position in his annual message. When a substitute becomes liable, the principal

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[72] CHARLESTON MERCURY, Jan. 5, 1864.

[73] HILLSBORO [NORTH CAROLINA] RECORDER, Jan. 6, 1864.

"should respond," because the government had received no compensation to exempt the substitute.[74]

Following Davis and Seddon, most newspapers portrayed as trivial any constitutional concerns. The exemption was made at the whim of the legislature; if you could eliminate or change the age exemption, why not an exemption for the rich, the Charleston *Mercury* asked? On the floor of the House and Senate, the constitutional issues were once again brushed aside.[75]

The bill passed easily on January 5, 1864, in the Richmond Virginia Capitol building designed by Thomas Jefferson in the 1790s, used by the Confederate Congress. Only 17 members of the House and two members of the Senate opposed it. That night it was the "talk of the town."[76] In February 1864, another Act repealed all remaining exemptions. According to the best estimate currently available, the Acts brought 30,000 men to arms.[77] But before some men reported they challenged the Act. The constitutional issues were destined for further exploration in the courts.

B. Judicial Resolution

In at least five states the principals—or those who provided substitutes for them—instituted *habeas corpus* actions. The cases worked their way through the state courts and were decided by the supreme courts of five states: Georgia, Alabama, Virginia, North Carolina, and Texas, in that order. They were decided between late February and late June, a span of about four months. These opinions represent, at the extreme, the triumph of radical Southern constitutional theory. And at their most moderate, they represent the attempt to maintain constitutional government.

How did Democratic values, such as narrow construction of grants, fit with preservation of social hierarchy and the desire of a minority of Southerners to maintain constitutional restrictions on the central government? The remainder of this essay seeks to show how the opinions came to be written in the particular way that they were. The goal is to achieve a greater understanding of the role of the various ideologies on constitutional law and on the operation of the courts in the nineteenth century. Because they deal with the same issue and were issued almost simultaneously, they allow for a rare examination into the factors that contribute to a particular outcome—and a particular explanation of that outcome. By holding the issue and time constant, as the opinions do, one can see the factors that led to the result in the conscription cases.

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[74] Seddon to Davis, Nov. 23, 1863, 2 OR, ser. 3, *supra* note 3, at 996-97.

[75] CHARLESTON MERCURY, Dec. 30, 1863.

[76] *See* [MOBILE] ADVERTISER, Jan 10, 1864, at 3.

[77] *See* EMORY M. THOMAS, THE CONFEDERATE NATION, 1861-1865 261 (1979).

In looking to origins of the judges' decisions, this essay focuses closely on their political affiliation, because political affiliation offers a proxy for a judge's position on the contracts clause. Because of the Act's extreme popularity, it is sometimes difficult to make distinctions on approach to the Act based on political affiliation, but the authoritative study of the Confederate Congress has shown that representatives who had been Democrats (there were no political parties in the Confederacy) were more likely than former Whigs to vote for conscription.[78] And by the "disheartening winter months of 1864-65," there appears to have been "substantially greater zeal among former Democrats than among former Whigs" for conscription.[79] This essay now takes up the opinions in the order in which they were delivered to show the panoply of views expressed in them and to demonstrate the mixing of the Democratic and Whig values that made up the courts' responses to the conscription act.

1. Georgia: The Common Law of Contract Approach

It was in Georgia that a state's highest court first heard the claim that the revocation of exemption was unconstitutional. Justice Charles F. Jenkins, a Whig who opposed secession, wrote the well-crafted opinion in *Daly & Fitzgerald v. Harris*, which focuses heavily upon the intent of the Confederate Congress in making its exemptions. Jenkins, who was born in South Carolina in 1805, attended Franklin College (later the University of Georgia) and graduated from Union College in Schenectady, New York, in 1824. He then read law with John Berrian, who later served as United States Senator from Georgia. From 1836 to 1850 he served in the Georgia legislature, including four terms as speaker of the House. In 1850 he wrote and promoted the "Georgia Platform" of 1850, in support of the Compromise of 1850.

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[78] *See* THOMAS B. ALEXANDER & RICHARD E. BERINGER, THE ANATOMY OF THE CONFEDERATE CONGRESS chap. 5 and table 5-1 (1972).

[79] *Id.* at 114.

Then, in 1852, an "Independent Whig" meeting in Milledgeville, Georgia nominated Daniel Webster for President and Jenkins as vice President. Webster died before the 1852 election, and the ticket received no votes outside of Georgia, but Jenkins continued his political career. He ran unsuccessfully for governor in 1853. He was unsuccessful in his run for the Supreme Court in 1859, when he was defeated by Richard Lyon, which caused a prominent attorney to lament that the Georgia Supreme Court had become the domain of "political intrigue." Jenkins finally reached the bench in 1860 when Governor Joseph E. Brown appointed him to fill a vacancy. Brown became known, along with North Carolina governor Zebulon Vance, for his jealous guarding of state's rights against the Confederate central government during the war, largely by opposing conscription. Jenkins' career as a jurist was relatively short-lived, however; he served until 1865. After the Civil War he was elected governor without opposition.[80]

Much more than other opinions, the Georgia opinion relies on the common law. It begins by examining the 1862 Act, which provided for draft and for exemption, then explains the facts of the cases before it. The first substantive legal discussion is the examination of whether there was a contract. The problem is analyzed upon common law contract theory, which required mutuality of agreement.[81] "Did the Congress so intend?" Jenkins asked. "For beyond their real intent and meaning they cannot be bound."[82]

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[80] *See* 10 DICTIONARY OF AMERICAN BIOGRAPHY 44; Baxter, *supra* note 52, at 495-96; ROBERT M. MYERS, CHILDREN OF PRIDE: A TRUE STORY OF GEORGIA AND THE CIVIL WAR 1593 (1972); C.C. Jones, Jr. to C.C. Jones, Nov. 11, 1859, *id.* 533-34. On Brown and Vance, *see* ESCOTT, *supra* note 64, at 89-93.

An examination of the circumstances of the Act satisfied Jenkins that Congress did not intend the Act to create a binding contract. Jenkins dispassionately portrayed the vast power of the Congress over raising an army. Starting from the premise that Congress had complete power over individuals, Jenkins inferred that it is doubtful that Congress had diminished its rights by allowing a binding exemption. But Jenkins did not think that it was necessary to draw inferences on exemption from an ambiguous statute. The statute had "no specified terms of a substitution exemption, no declaration of legal consequences to ensue," in short, "nothing which savors of abdication or suspension of the power confessedly possessed by the Legislature over him who is permitted to furnish a substitute."[83] From the war power he concluded, "[t]his view of the danger of the loss to the public service is too palpable to admit the supposition that it could have escaped the attention of Congress."[84]

Further, there was no protected contract right because there was no clear intent by Congress to make an irrevocable exemption. The statutory language established that the legislature asserted an absolute right to compel service, but was permissive in granting an exemption. Finally, the same legislature that granted the exemption took it away. "This is equivalent to a declaration that in authorizing substitution they had not intended to bind their constituents irrevocably, but to grant a privilege revocable at the will of themselves."[85]

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[81] Daly & Fitzgerald v. Harris, 34 Ga. Supp. at 43. The utility of the subjective theory of assent is useful to jurists who want to narrowly construe government contracts. Nineteenth century contracts law applied the subjective theory outside government grants. But already there was a movement towards objective assent, which did not look to the parties' true intentions but only to the apparent meaning of the contract. Compare 2 JAMES KENT, COMMENTARIES * 555 (2nd ed. 1832); 2 THEOPHILIUS PARSONS, THE LAW OF CONTRACTS 3-4 (1855).

[82] Here, as in many Jenkins opinions, a treatise, the popular Chitty's *Contracts*, published in England, is cited for a basic legal propositions, that "mutuality or assent is the essence of a contract." *Dely & Fitzgerald*, 34 Ga. Supp. at 43.

[83] *Dely & Fitzgerald*, 34 Ga. Supp. 45.

[84] *Id.*

The court next refuted the argument that the exempted men had acquired a right to exemption because they expended money, which it characterized as based on "false hopes and expectations upon the statute."[86] The court refuted this argument by analogy to exemptions based on occupation, such as a manufacturer of necessary supplies. The manufacturer acquired no vested right to exemption when he purchased equipment to begin manufacturing.[87]

The next paragraph is unique among the courts' opinions. The Georgia court notes that "the character of our free institutions authorizes, nay invites severe criticism upon the acts of public servants and if within reasonable limits, its effects are decidedly conservative." Presumably the court thinks that the criticism and hence conservatism are appropriate. The conservatism is the protection of individuals' vested rights against revocation by subsequent legislatures. But "there is a manifest proneness to excess, tending to impute wrong designs and thereby weakening public confidence and enervating legitimate power."[88] When the legislature has rightful authority, the courts cannot impute an intent to oppress citizens. The court closed this portion is its opinion by urging support for the men who challenged the revocation of exemption:

> Here we turn aside from the argument to enter a voluntary protest against the prevalent denunciation of exempts by substitution. Whilst it would be excessive tenderness to give them relief at the cost of detriment to the public service, we can readily imagine that many of them honestly mistook their rights. Neither in availing themselves of the privilege allowed by law, nor in appealing to the Courts to define the extent of that privilege, have they exhibited any lack of patriotism or courageous manhood. . . . Let good and true men of this class neither leave home laden with unmerited reproach not encounter it on the field to which they repair.[89]

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[85] *Id.* at 47.

[86] *Id.* at 48.

[87] *Id.*

[88] *Id.* at 49.

[89] *Id.* at 49-50. For discussion of the conflict over wealthy people obtaining

The remainder of the Georgia opinion turns to the second issue that concerned Jenkins. Even if there had been mutual assent, "had the legislature and executive departments . . . power to make such a contract?"[90] Jenkins began his discussion by invoking "writers upon the social compact and political law": Burlamaqui, Emmrich Vattel, Secretary of War (later President) James Monroe, and John C. Calhoun.[91] Those writers established "the proposition inwrought with the foundation of all society, that each member owed *to all other members* . . . the duty of defending the State, as far as he is capable." No government could "release him from this obligation."[92] Cases from the United States Supreme Court and state courts demonstrated that a state could not "divest itself or its successors of any power necessary to the well-being of the state."[93] A practical argument followed to show why the Confederate Congress could not have the power to grant irrevocable exemptions: the Congress could grant exemption to a half-million soldiers and "thus, with a powerful enemy on the borders, alien by contract the entire defensive force of the country, placed at their disposal solely for its defense."[94] This reference to the powerful enemy is the first and only reference to the Northern army. Where other states' opinions drip with fear of the enemy, Georgia's does not.

The opinion then notes that neither practical reasoning nor references to the social compact and other original principles are necessary; the Confederate Constitution provides the an-

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exemptions that Jenkins was trying to quiet, *see* T. CONN BRYAN, CONFEDERATE GEORGIA 143-44 (1953).

[90] *Dely & Fitzgerald,* 34 Ga. Supp. at 50.

[91] BURLAMAQUI NATIONAL AND POLITICAL LAW 151; EMMERICH VATTEL, LAW OF NATIONS, bk. 3, secs. 8, 10; Monroe, 7 NILES WEEKLY REGISTER 138-39 (1841); CALHOUN, DISQUISITION, *supra* note 28, at 10, 20, 53.

[92] *Dely & Fitzgerald,* 34 Ga. Supp. at 50.

[93] *Id.* (citing Ohio Loan & Trust Co. v. Debolt, 54 U.S. (16 How.) 593 (1845); Gosler v. Georgetown, (6 Wheat. 593); Hamrick v. Rouse, 17 Ga. 59, 60; Bailey v. State, 20 Ga. 744; Presbyterian Church v. Mayor and Council of New York, NY (5 Cowen) 538 (1811)).

[94] *Dely & Fitzgerald,* 34 Ga. Supp. at 51, 53.

swer.[95] The Confederate Congress has only powers expressly delegated to it. The people delegated the war power and—Jenkins assumed without citation—the power necessary and proper for carrying out the delegated war power.[96] "Far from being necessary and proper for that purpose [to fulfill war powers] it may be well stated that when contracts of exemption are made they hinder and obstruct all subsequent efforts to raise armies, and, within the range of possibility, they might be so multiplied as to render impracticable the raising of an efficient army, or, in other words, to defeat the exercise of the power altogether." The opinion concludes by discussing the need to have discretion to exempt "men who can be more useful at home than others, and more useful there than in the field."[97] Congress needs to have discretion to exempt men, but cannot be bound by an exemption. That would hinder the exercise of "another power expressly granted for a purpose *vital* to the Confederate States."[98] The opinion, thus, uses common law contract principles to deny the principals their claim. It goes on to discuss in balanced terms, Congress' inalienable right to request service from its citizens. Such an opinion leads one to conclude that Jenkins, like better-known Whig judges, tried hard to resolve complicated constitutional issues in dispassionate common law terms.[99]

Jenkins' balanced approach is not surprising given his other opinions. During his five years on the bench he wrote several other opinions dealing with conscription. In an exhaustive opinion delivered at the November 1862 term, *Jeffers v. Fair*, Jenkins upheld the constitutionality of the first conscription act.[100] Drawing upon the experience of the framers of the United States Constitution and upon more recent American history, Jenkins established the necessity of granting the Confederate government power to conduct war for the means specified in the Constitution. The opinion carefully threaded the path between granting absolute power to a central government to conduct war for any purpose, which leads to a "consolidated republic," and the reservation of too much power to the states, which leads to the opposite and equally fatal result: "the shadow of a government" and ultimately the failure of "the experiment of Confederate Republics."[101] Jenkins' language and citations are to republican thought. Besides the *Federalist* he cited continental scholars to demonstrate that civil, natural law itself limited the power of a government. Much like the framers of the Confederate Constitution, Jenkins sought to create a world that gave states and individuals the power to balance the power given to the Confederate government.[102]

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[95] *Id.* at 51.

[96] The Constitution contained no general "necessary and proper" clause.

[97] *Id.* at 54. Jenkins' reading of the scope of the war powers' implied necessary and proper clause was extremely narrow.

[98] *Id.* at 55.

[99] *Cf.* LEONARD LEVY, CHIEF JUSTICE LEMUEL SHAW (1957).

[100] Jeffers v. Fair, 33 Ga. 347, 371 (Nov. Term 1862).

According to Jenkins, even in time of war the government had to follow the Constitution. When he upheld the Confederacy's first conscription act, Jenkins concluded his opinion with gratification that "when flagitious war is engulfing our country" the court is able "in perfect consistency with the obligations of our official duty" to uphold the Confederacy's power to act. Perhaps Jenkins' clearest divergence from the Democratic radicals came in an opinion upholding the Confederate impressment act, which allowed the army to impress civilian merchandise into military service. The court must give deference to the Confederate Congress' interpretation of the Constitution, but he warned that "not even war, with its attendant horrors, may rightfully impel the judiciary. Positive conviction of constitutional obligation may not be yielded under any circumstance." Even to the end Jenkins stuck by his convictions. At the March 1865 term, he explicitly avoided extreme opinions, promising to bridle usurpation, even when done for public good.[103]

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[101] *Jeffers*, 33 Ga. at 364-65.

[102] *Id.* at 365-67 (citing Burlamaqui, Rutherford, Blackstone, Vattel). In another opinion Jenkins listed the Constitution's checks and safe-guards against abuse of the war power: short tenure of officials, multiple members of Congress, division of Congress into two houses, President has veto power, and judiciary may arrest unconstitutional laws. Barber v. Irwin, 34 Ga. 28, 38 (Nov. Term 1864) (reaffirming *Jeffers* by upholding the constitutionality of conscription). On intention of the framers of the Confederate Constitution and the American Constitutional Tradition, *see* Donald Nieman, *Republicanism, the Confederate Constitution and the American Constitutional Tradition*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 201 (Kermit L. Hall & James W. Ely, Jr., eds., 1989).

Jenkins' position, protective as it was of the constitutional rights of Georgia's citizens, ultimately upheld the Confederate government's actions. Justice Richard Lyon acted even more firmly to protect the rights of Georgians. Lyon, a Whig who attended Franklin College (later the University of Georgia) and read law with Georgia Justice Joseph Lumpkin, was elected by the legislature in 1859 to the Supreme Court and served until 1866.[104] He filed a brief, ambiguous concurrence to Jenkins' opinion in *Daly*, in which he said that he did not subscribe to Jenkins' reasoning, but thought it unproductive to supply his own analysis.

One can gauge Lyon's sentiments from his dissent in an earlier case involving substitutes, *Weems v. Williams*. The majority opinion in *Weems*, written by Jenkins, upheld an 1863 law revoking a principal's exemption when the substitute he had provided became liable for service. *Weems*, thus, involved substantially similar issues to *Daly*. (*Daly* differed from *Weems* only in that it required a principal to serve even if the substitute was not independently liable for service.) In an opinion strangely bereft of citations to authority—its only citation in the seven page opinion was to an obscure treatise on statutory interpretation—Jenkins brushed aside the constitutional issues, arguing that the legislature merely granted a privilege, not a binding contract. Moreover, he pointed out, the substitutes were accepted pursuant to a military regulation that explicitly stated that the principals would become liable to service if the substitutes were conscripted, thus simplifying the Contracts Clause issue.[105]

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[103] *Jeffers*, 33 Ga. at 371; Cummingham v. Campbell, 33 Ga. 625, 634 (Dec. Term 1863); Parker v. Kaughman, 34 Ga. 140 (March Term 1865). In *Parker*, Jenkins considered the Confederate Congress' act compelling military service reasonable in light of the danger. Because republican principles contained no "necromancy to spirit away the invader" the Republic needed to "match strength with strength." *Id.* at 142-43. Likewise, in a case involving construction of a grant of right of way to a railroad he wrote that courts must never act according to the unsound ethical maxim, "the end sanctified the means." Savannah, Albany & Gulf R.R. Co. v. Shields, 33 Ga. 601, 616 (Nov. Term 1863).

[104] *See* MYERS, *supra* note 80, at 1536.

Lyon's dissent in *Weems* disposed of the contract issue by arguing that the military regulations could not limit the rights granted by statute; it rested on the Confederate government's moral obligation to uphold exemptions that it had granted. The first conscription act was harsh and to mitigate its rigor, the government allowed exemptions. "This privilege . . . was a right in the citizen, as absolute and indubitable as the liability was imperious and necessary." To revoke the exemption left the principals with the "feel[ing] that they have been cruelly oppressed by the Government in breaking up and defeating a contract made by them upon its most deliberate consent. They must feel that the Government . . . has violated its blighted faith—a thing much more injurious than the loss of a few soldiers from the army."[106]

2. *Alabama: "Self-preservation is the supreme law"*

Alabama's opinion, *Ex Parte Tate*, was written by John Phelan, a Democrat who actively promoted secession. Born in New Jersey in 1810, Justice Phelan graduated from the University of Tennessee. He was appointed in 1864 to fill a vacancy on the Alabama Supreme Court. Justice Phelan opens with a general discussion of the nature of government: "Government is ordained by God and the powers confided to governors are held in trust for the benefit of the governed."[107]

Justice Phelan immediately established the power over "war and peace" as he called it, a power that ranks first in importance.[108] He "fortif[ied]" his position with references to

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[105] *See* Weems v. Williams, 33 Ga. 414 (Jan. Term 1863).

[106] *Id.* at 434.

[107] *See* 4 DICTIONARY OF ALABAMA BIOGRAPHY (Thomas McAdory Owen ed., 1921) 1356; WILLIAM L. BARNEY, THE SECESSIONIST IMPULSE: ALABAMA AND MISSISSIPPI IN 1860 228-29 (1974) (Phelan wrote and spoke in favor of secession and raised fears of racial mixing); Ex Parte Tate, 39 Ala. 254, 255 (Jan. Term 1864).

[108] *Tate*, 39 Ala. at 256. "This war-and-peace power, conferred on the Congress

Vattel and Burlamaqui, that the state has the right to compel service from its citizens, and to Wheaton, that each state has the right of self-preservation, which includes all incidental rights necessary to preserve the government, including compelling military service. Calhoun, the court wrote, showed with particular reference to the American government that "exigencies will arise in which the entire power and resources of the community will be needed to defend its existence . . . . Self preservation is the supreme law, as well with communities as individuals."[109]

Having established the political principles under which the court operated, Justice Phelan framed the question as whether the Confederate Congress has the power to grant "permanent and irrepealable exemptions . . . upon *any terms* . . . *whatsoever?*"[110] He held that Congress could not make irrepealable exemptions. Justice Phelan established that sovereignty encompassed certain powers that no legislature could grant away. "Certain high functions . . . can neither be surrendered nor sold. They cannot be vested in private persons . . . ."[111] He focused particular attention on the power of taxation and eminent domain, drawing upon *West River Bridge*.

Phelan surveyed the shifting opinions in the United States Supreme Court on the taxing power to show that "In view of this divided state of legal opinion, . . . it may be fairly claimed, that the question, whether the *taxing power* is not one of those great attributes of sovereignty, which cannot be finally surrendered or impaired by an ordinary act of legislation, still remains *in dubio*."[112] But if there was doubt about whether the legislature could grant away its taxing power, "there are un-

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of the Confederate States by the Constitution, with so much care, and in so ample a manner is the highest and most vital trust confided to that government." *Id.*

[109] *Id.* at 257, 259 (quoting *Disquisition*).

[110] *Id.* at 259 (emphasis in original). *West River Bridge* was a popular case among Alabama Supreme Justices. Chief Justice A.J. Walker relied upon it in upholding impressment of railroad stock. Alabama & Florida R.R. v. Kenney, 39 Ala. 307, 310 (Jan. Term 1864).

[111] *Tate*, 39 Ala. at 259.

[112] *Id.* at 263.

questionably certain high attributes of sovereignty, which do not allow of any such limitations."[113] That higher power was the right of eminent domain, which Phelan described as "the right which belongs to the society, or the sovereign, of disposing in case of necessity, and for the public safety, of all the wealth contained in the State."[114] The right of eminent domain could not be surrendered because the right was an attribute of sovereignty itself.

> No matter who may be the holder of property, nor how solemnly any legislature may have declared their intention that its grantees shall have an exclusive right to the enjoyment of that property, whether it be a tract of land, or the franchise of a railroad company, such legislature cannot make them more or less than private property at last, and this great attribute of sovereign power holds all property subject to be taken for public uses when the common welfare of the community requires it. What sort of government would that be, which did not hold under its constant direction and control the great public interests which stand connected with our roads, bridges, ferries, turnpikes, railroads, and canals; our jails, penitentiaries, court-houses, and capitols; our market-places, streets, wharves, in towns and cities; our asylums, hospitals and cemeteries, and public seminaries of learning; and, as more immediately connected with the public defense, our forts, arsenals, armories, and navy-yards?[115]

Having firmly established that eminent domain powers could not be alienated, Phelan analogized the war power to eminent domain. If the eminent domain power could not be alienated, what principle would allow a legislature to grant irrepealable exemptions from "that more vital and essential sovereign attribute, the right to call into the field every citizen of the state should public safety require it?"[116]

"All contracts are made subject to those rights, and nothing can be done to interfere with them."[117] Phelan concluded that "no respectable authority can be found which conflicts with the idea that contracts incorporate the principle of eminent domain."[118] He then clinched the case with reference to the greater importance of the war power. To further show that the exemption was not binding, because military exemptions are a mere privilege, the opinion invoked *Commonwealth v. Bird*, a Massachusetts case from 1810.[119]

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[113] *Id.* at 264.

[114] *Id.*

[115] *Id.* at 265.

[116] *Id.* at 268.

The court's exhaustive treatment of eminent domain and taxation cases showed that every state has the right to eminent domain and that its right cannot be given up by contract:

> It would exhibit a strange adjustment of the principles and powers of government . . . that all the money in the world could not suffice to purchase, even through the solemn formalities of a legislative contract, the exemption of a piece of land from being taken by the state for a road, or a bridge, or the site for a fort, if the public good required it; and yet that an able-bodied citizen could be allowed by law to buy, for a few dollars, an absolute exemption from the military service of his country, although that country might at the time be engaged in a death-struggle to maintain his liberties and its own existence.[120]

Phelan's other opinions point in the direction he was headed. He consistently interpreted the Constitution and legislation in ways favorable to the government. In a technical opinion turning on statutory interpretation, he held that males became liable for active military service on their eighteenth birthday. Another opinion turning on an intricate statutory interpretation and analysis of federal-state relations upheld Alabama's right to require plantation overseers who had been exempted from service in the Confederate Army to serve in the state militia.[121]

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[117] *Id.* at 266-67.

[118] He cited fifteen cases, including *Charles River Bridge,* to support his inalienable power argument. Phelan's citations were to cases upholding the traditionally Democratic argument. Elsewhere in the opinion, he referred to Chief Justice Bartley's opinion in *Toledo Bank v. Bond,* 1 Ohio St. 623, which refuted *Dartmouth College*'s protective stance towards the Contracts Clause. *See id.* at 263.

[119] *See id.* at 270.

[120] *Id.* at 272.

Phelan rested on the bulwark of inalienable war power; the nuances of contract law and of statutory interpretation were not important to the decision. The court explicitly "waive[d] the discussion of" whether the original exemption act should be construed to allow Congress to revoke the exemption at will. Instead, Phelan found "higher and firmer grounds on which to base a decision."[122] One should probably admire the decision for its forthright grappling with the central issue and certainly for the insight it provides into Alabama in relation to the other Confederate courts. Justice Phelan in no way wanted his decision on this political issue to be confused with technical issues of contract law. That may not be surprising, because his three sons were serving in the Confederate Army and his brother, James, was one of the staunch defenders of the Act's necessity in the Confederate Senate.[123]

Justice George Washington Stone delivered a mysterious one paragraph opinion, which defies classification as either a concurrence or dissent. Stone wrote that he did not want to file a dissent, but observed that he did not agree with Phelan's opinion. Stone, identified by his biographer on somewhat dubious grounds as a lifelong Jacksonian Democrat, was born in 1811 in Virginia and read law in Fayetteville, Tennessee, then migrated to Alabama in 1840, where he served in the legislature. He served on the court from 1856 until 1865 and then again, after the war, from 1874 to 1894. Stone's position is somewhat puzzling, because he had previously upheld portions of the conscription act and seemed ready to give the Confederate government ample power pursuant to the war power. Perhaps his dissenting opinion in *Dawson*, which argued that the state militia could not conscript farm overseers who were exempted from service in the Confederate Army, offers a key to understanding Stone. *Dawson*, and some of Stone's pre-war cases, promised to protect individuals from the government, a position at odds with Phelan's radical opinion.[124]

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[121] *See* Ex Parte Starke, 39 Ala. 475, 488 (June Term 1864); State ex rel Dawson, 39 Ala. 367 (June Term 1864). The intricate *Dawson* opinion turns upon whether the exemption provided to overseers was tantamount to a delegation from the Confederate Army to a farm. Phelan concluded that it was a mere exemption, so that the overseer was not enrolled in the Confederate Army and was thus available for state service. The militia was critical for the protection of the state against slaves. *See* CLARENCE L. MOHR, ON THE THRESHOLD OF FREEDOM: MASTERS AND SLAVES IN CIVIL WAR GEORGIA 214-16 (1986).

[122] *See Tate*, 39 Ala. at 272.

[123] *Id.* One son had already been killed at Fredericksburg; another died at Petersburg. *See* 4 DICTIONARY OF ALABAMA BIOGRAPHY 1356. On his brother, see CONFEDERATE UNION, Jan. 12, 1864. Phelan's poetry, like his judicial philosophy, was heavily influenced by his wartime experience. *See* "Ye Men of Alabama," and "The Good Old Cause," in WAR POETRY OF THE SOUTH (William Gilmore Simms ed. 1866).

3. *Virginia: "the army . . . would be the most efficient instrument . . . for the defeat of the object in view"*

The Virginia opinion in *Burroughs v. Peyton* was the longest of the five. It relied upon careful parsing of the constitutional issues, followed by a finding that there was no enforceable contract. Forty-seven year old Justice William Robertson, graduate of the University of Virginia law school at age twenty-five and a secessionist Democrat, wrote the majority opinion.

Robertson's opinion began by settling the fundamental question of whether the Confederate Congress had the power to pass any conscription at all. He was sensitive to the "transcendent" power of "coercing the citizen to render military service." He relied upon a detailed parsing of the language of the Constitution, as illuminated in light of the *Federalist*, English practices before the Revolution, and John Marshall's biography of George Washington. The Virginia court also emphasized the war power, with reference to the American situation. Instead of the bare question of power, the right of the state to compel the ultimate sacrifice from its citizens, Virginia rested on a refined analysis of the *Federalist*, as well as from examples of conscription from the Revolutionary War and the War of 1812. That illustrated that the framers of the Confederate Constitution included conscription as one of the war powers. He relied on a careful balancing of power in interpreting the Constitution: there was no serious reason to fear military dictatorship from conscription because "the army, when raised, would be the most efficient instrument that could be devised, for the defeat of the object in view."[125]

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[124] 4 BIOGRAPHICAL DICTIONARY OF ALABAMA 1628-29; WILLIAM H. BRANTLEY, CHIEF JUSTICE STONE OF ALABAMA 95 (1964); HUEBNER, *supra* note 18, at 160-85; J. MILLS THORNTON, POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA, 1800-1860, 239 (1978); Ex Parte Hill, 38 Ala. 429, 447 (Jan. Term 1863). In *Hill*, after discussing the need to balance state and federal powers, Stone wrote that "the magnitude of the war that is being waged against us renders it necessary that the government put forth its greatest strength for the protection of our liberty. . . . [This] could not be accomplished by any means short of compulsory enrollment; and hence I hold that the conscription acts are constitutional." *Hill* emphasized the importance of respect for the sovereignty of the state and federal government, a hint that he wanted to balance state, federal and individual interests. *Id.* at 446; *Dawson*, 39 Ala. 367, 393; Stately v. Langley, 34 Ala. 311 (1859) (invalidating law that took land for private corporation's purposes).

Having established the right to conscript, Robertson then argued that the Congress did not have the constitutional power to make a contract that would exempt a person from future service in the military: "No government can have the right to endanger the life of the nation it represents, by contracting that it will not exercise the powers confided to it." Robertson supported his assertion with prominent Taney Court precedents.[126]

He went a step further and said that Congress never tried to make a binding contract. He again used Taney Court cases, including *Butler* and Justice Campbell's famous phrase that a "plain distinction exists between statutes which create hopes and expectations, and those which form contracts."[127] Then the narrow construction of grants came in. There was no evidence that the government believed that it was entering a contract and he refused to recognize equitable grounds for relief.[128]

The elegant opinion, which is attentive to the potential for abuse by the central government may result from Robertson's training at the University of Virginia, where Henry St. George Tucker was teaching. Tucker's *Lectures on Natural Law*, which Robertson would have attended, advocated a similar balancing of power with liberty.[129] The opinion differs from the others in its abstraction, its self-conscious application of the rule that the Constitution should be construed to protect liberty, its questioning of where power exists in the government, and its reasoning based on general principles of government, which have been revealed in the American experience.

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[125] 16 DICTIONARY OF AMERICAN BIOGRAPHY 359; Burroughs v. Peyton, 57 Va. (16 Gratt.) 470, 479 (1864).

[126] *Burroughs*, 57 Va. at 487, 489 (citing *East Hartford*, which held that the state cannot make irrepealable contracts on matters of public interest).

[127] *Id.*

[128] *Id.*

The press seized upon the unanimous opinion of the Virginia Court of Appeals to support conscription. The *Richmond Whig* reprinted a paragraph, including Robertson's carefully balanced statement that "A *nation* cannot foresee the extent of the dangers to which it may be exposed; it must, therefore, grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength." Robertson recognized the inherent danger in conferring the power on a central government, but reassured that denying the central government national power was not the solution. Rather, the quotation continued, "The hazard of abuse should be guarded against, by so framing the government as to render it unlikely that it will use the power oppressively."[130] The *Richmond Enquirer* used the opinion to respond to a *Charleston Mercury* editorial charging the Confederate Congress with violations of the Constitution. Jefferson Davis relied upon the Virginia opinion to support conscription.[131]

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[129] HENRY ST. GEORGE TUCKER, A FEW LECTURES ON NATURAL LAW (J. Alexander, Charlottesville, 1844).

[130] RICHMOND WHIG, March 11, 1864. The paragraph printed in the WHIG included extra phrases that do not appear in the published opinion.

[131] *See* RICHMOND ENQUIRER, March 12, 1864 ("The Supreme Court of Virginia has unanimously decided that the Conscription act is constitutional. There is no need of a Convention on that point."). The CHARLESTON MERCURY editorial, "The Course of the States," was reprinted in the RICHMOND WHIG, March 11, 1864; Jefferson Davis to Zebulon Vance, OR III, *supra* note 3, at 200-01.

4. North Carolina: "Necessity Knows No Law"

The seriatim opinions of the three North Carolina Supreme Court Justices in *Gatlin v. Walton* make North Carolina the most illuminating of all the courts because of their exhaustive treatment and because the Chief Justice dissented.

Justice William Battle, a professor of law at the University of North Carolina at the beginning of the war, wrote one of the two majority opinions for the North Carolina court. Battle, who had served in the North Carolina legislature as a Whig before the war and opposed secession, began his analysis by observing that the powers of the legislature were closely modeled on those of the British Parliament. He then went on to examine the powers of Parliament and the early American states, before the ratification of the Constitution, to "aid us . . . in our investigations." He thereby developed the position that states—before the adoption of the United States Constitution—had the right to violate contracts.[132]

Having established the awesome power of the states underlying the Constitution, he then turned to the United States Constitution and demonstrated, by reference to James Madison's *Federalist* 23, that the war powers "ought to exist without limitation." The Constitution's war power, which "is given in the most unlimited terms," was based on the recognition that "[t]he first duty of a nation is that of self-preservation, and to that end, it has a right to do everything necessary for its preservation."[133]

Battle then built on the war power to argue that the Confederate government has the power of eminent domain and from that, presumably, can "whenever the necessities of the country should require . . . annul and disregard it."[134] This was a variance of the inalienable power doctrine.

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[132] 2 DICTIONARY OF AMERICAN BIOGRAPHY 58 (1929). Justice Battle's opinion recognizes that the American states followed Great Britain and the exceptionalism of the British model: "The source from which legislative power was supposed to be derived in the nationalities of the Western continent was very different from what it was in the Eastern; but the extent of power, except in the cases of a restriction by a written constitution, varied very little in the legislatures of the free states of America from that of the Parliament of Great Britain." Gatlin v. Walton, 60 N.C. 310, 327-30 (1864). Perhaps his interest in British precedent derives from his work as editor of NORTH CAROLINA REPORTS, 1789 TO 1798.

[133] *Gatlin*, 60 N.C. at 332, 331, 332 (quoting Vattel and citing Ex Parte Tate, 39 Ala. 254).

But Battle did not need that argument, because he argued that exemption was neither a tangible piece of property nor a contract, but was a mere "privilege." He went on to argue that the contract incorporated the government's right to require service under the war power. Thus, the justice who had already lost two sons in the fighting was able to say "The necessities of a nation as of an individual, have laws of their own, and that is the true meaning of the celebrated maxim, 'necessity has no law.'"[135]

The other justice in the majority was Mathias Manly. Manly, a Whig who may have switched allegiance to the Democratic party in the late antebellum period and who favored secession, was also educated at the University of North Carolina. He was elected by the legislature to the court in 1859 to replace Thomas Ruffin.[136] Manly began with a key tenet of Democratic jurisprudence, that all contracts are subject to conditions. He recognized that much of the discussion was theoretical and rarely discussed, because the principle has rarely "supposed to have any bearing upon the practical affairs of mankind."[137] Nevertheless, Manly explained the emergency:

> If any evidence were proper or needful to confirm the truth of the view taken by Congress, a survey of the situation at that time would convince any unprejudiced mind. A large portion of the States was occupied by a foreign foe. The invasion was established by a power, stronger in all military appointments than ours, having an overwhelming population more numer-

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[134] *Id.* at 336.

[135] *Id.* at 336-38.

[136] 6 BIOGRAPHICAL DICTIONARY OF NORTH CAROLINA 357-68; James Hamilton, *North Carolina and the Confederate Courts*, 4 J. S. HIST. 366 (1937); Reuel E. Schiller, *Conflicting Obligations: Slave Law and The Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1220-21 n. 61 (1992); 3 THE PAPERS OF THOMAS RUFFIN 104 (J.R. Hamilton ed., 1920).

[137] *Gatlin*, 60 N.C. at 342.

> ous in the proportion of five to one, and large armies were mustered and marched into the country by every open avenue to pillage and waste the land. . . . Surely the time had come, if such a time can come, when the government has a right to call upon every man to aid in its defense. Authorities are abundant, as to the rights and duties of the war power in such an emergency. . . . Every other consideration yields to self-preservation—the supreme law.[138]

Manly supported his arguments with reference to Vattel, Burlamaqui, Wheaton and Calhoun to show that in such emergencies the state's war power supports calling men and money into service. Manly's citation to Calhoun provides a direct link between the antebellum philosophy and the conscription cases.

Manly then shifts into a straight contracts analysis, asking whether there ever was a contract. He relied upon a Justice Campbell opinion to distinguish between statutes that create contracts and those that merely gave rise to hopes. How could the government have intended to make a contract, he asked, when the government merely gave up its right to service and received nothing in return? The government never received consideration for the contract. And the government never recorded any specific intention to grant a permanent exemption; relying again upon the pillar of Democratic jurisprudence of *Charles River Bridge*, as well as Parsons on Contracts and a North Carolina case, he concluded that there was no contract.[139]

Chief Justice Pearson, the 59 year old former Whig unionist from western North Carolina, who became a Republican in 1868 and then served in North Carolina government, filed the only written dissent of the seventeen judges involved in the five cases under study. His opinion is particularly important because it demonstrates that another outcome besides support of the Confederate central government was possible.[140]

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[138] *Id.* at 340-41.

[139] *Id.* at 344, 345, 346 (citing *McCree*, 47 N.C. (2 Jones) 186).

[140] Lower courts in Georgia also invalidated various conscription acts. *See, e.g.*, Daly v. Harris, 33 Ga. Supp. 38, 40 (1864) (Judge Bingham held 1864 Conscrip-

Pearson had previously foiled attempts by the Confederate Army to suspend *habeas corpus*. His opinions, which jealously guarded individual rights at the expense of the central government and the war effort, attracted the attention of President Davis. North Carolina Governor Zebulon Vance, notorious for his states' rights stance, referred to Pearson's opinions in correspondence with Davis.[141]

Pearson had also previously dealt, in an opinion written in chambers, with a case involving the conscription of a principal arising from the Confederate Congress' Conscription Act of 1863, which expanded conscription by increasing the maximum age for service from 35 to 45. When that happened, many substitutes were then liable for service themselves. The War Department maintained that when his substitute became liable for service, the principal became liable. Pearson's opinion in *Ex Parte Bryan*, written in June 1863 exempted the principal.[142]

Pearson had also issued the first decision in North Carolina on the 1864 Conscription Act when he decided *Gatlin* while sitting as a single justice in his chambers in February 1864. It was an open secret in North Carolina that when the entire court met in June, Manly and Battle intended to reverse Pearson and uphold the act. Nevertheless, Pearson's decision led Attorney General Thomas Bragg to propose halting conscription in North Carolina and to propose the suspension of *habeas corpus*.[143]

Pearson was, therefore, well-familiar with the issues. He began by noting the well-established right of courts to review the constitutionality of legislation and then distinguished between legal questions and political questions. Probably the attempt to distinguish political from legal questions is an attempt to remove the debate from the highly suspect arena of

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tion Act unconstitutional).

[141] *See* ESCOTT, *supra* note 64, at 79-86.

[142] *See In re* Bryan, 60 N.C. 1 (1863); *In re* Ritter, 60 N.C. 76 (1863); Mann v. Parke, 16 Va. 443, 33 Ga. 413. OR III, 231.

[143] *See* INSIDE THE CONFEDERATE GOVERNMENT: THE DIARY OF ROBERT GARLICK HILL KEAN 138 (Edward Younger ed., 1957); Hamilton, *The North Carolina Courts and the Confederacy*, *supra* note 136, at 366-403.

politics. It is here that he boldly stated that "my brothers Battle and Manly have put the decision on the only ground which is unanswerable, 'necessity knows no law;' for if the Courts assume that the government may act on that principle, there is no longer room for argument."[144]

Justice Pearson noted that in this case the law, the domain of the courts, related solely to "the dry question of the common law," whether there was a contract between the individual and the Confederate government. Pearson went through the basic requirements of a contract: parties capable of contracting, "a thing to be the subject of contract," and then the keystone of consideration. For Pearson, the question turned upon whether the government and the individual had agreed to "an exchange or a 'swap,' as it is commonly called." Did the government give up something in exchange for the exemption of the soldier? Pearson thought so: "The Government agrees to discharge a man in consideration of his putting a sound, able-bodied man in his place, and it is done; this is a valid contract."[145]

Having established to his satisfaction the existence of a contract, he then argued that the Confederate Congress' power is limited. "The other governments referred to, have no written Constitution, and may act on the broad and arbitrary rule, 'the safety of the state is the supreme law;' but the Confederate States has a *written Constitution*."[146]

5. *Texas: Moral Philosophy and Virginia Revisited*

Last, and in many ways least, the Texas Supreme Court followed with *Ex parte Mayer*, delivered in June 1864. Justice Ruben A. Reeves, elected to the court in 1864, is obscure. Born in 1810 in Tennessee, Reeves read law in Kentucky and practiced in Dallas before his election. Like the Chief Justice of the Texas Supreme Court, Owen M. Roberts, Reeves supported secession. After the war he served on the Texas Supreme Court in the 1870s and later served as a Justice on the New Mexico

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[144] *Gatlin*, 60 N.C. at 350.

[145] *Id.* at 352.

[146] *Id.* at 355.

Supreme Court.[147]

Reeves began his opinion, which resembled an exegesis on abstract constitutional issues more than it did an opinion deciding a concrete case, by marking out the express and implied powers of the Confederate and state constitutions. The expressed power of Congress to raise armies was intended, "no doubt, to confer a real and substantial power." The opinion recognized the multi-faceted balancing necessary among the rights of the state government and the need to respect the rights of the Confederate states as a whole. Disrespect for those concerns would "pervert the power which was intended for the protection and common defense of all the states into an engine of self-destruction; and its work would be accomplished with as much certainty as though the territory of a state should be invaded by physical force, under authority of the Confederate states."[148]

The court then made the revealing observation that the legislature is to decide on the appropriateness and constitutionality of laws. Courts, then, do not so much invalidate laws because they are unconstitutional, but simply withhold their consent, thus making the laws unenforceable. That enigmatic observation led the *Mayer* court to the conclusion that great deference should be given to the legislature's actions.[149]

The court next moved to the observation that nothing prevented Congress from violating the obligations of contract and cited an opinion issued by a justice riding circuit. But the court took seriously the Contracts Clause argument; it did not "intend to rest the decision . . . on the doctrine that congress can violate the obligation of a contract."[150] Reeves, therefore, discussed Contracts Clause jurisprudence generally to deduce several principles. Reeves thought that there was no contract because the type of contract protected by the Contracts' Clause are ones by which private property vests, not rights "growing out of governmental regulation."[151]

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[147] *See* Charles W. Ramsell, *Presidential Reconstruction in Texas*, 11 Q. OF TEX. ST. HIST. ASS'N 277, 303 (1908); C. Alwyn Barr, *The Making of a Secessionist: The Antebellum Career of Roger Q. Mills*, 79 SW. HIST. Q. 129, 132 (1976).

[148] Ex Parte Mayer, 17 Tex. 715, 718, 718-19 (1864).

[149] *Id.* at 719.

[150] *Id.* at 720.

The analysis is also substantially less complete than the other courts'. Rather than canvassing the whole scope of opinions, it discusses Justice Daniel's opinion in *Butler* in one summary paragraph. In the next paragraph it discusses the Massachusetts case of *Bird*. Then the court concludes that only contracts related to private property are protected. The opinion's reliance upon *Butler* and *Bird*, rather than resorting to the government's power to compel service, is interesting because it suggests that the Texas court was moderate.

That completes the main work of the opinion. In the remaining paragraphs Reeves disposes of the just compensation argument with the same reasoning he used to dispose of the contract clause argument—the just compensation principle only applies to tangible property. Next comes a comparison of the right of a sovereign to compel military service and the right to just compensation, concluding that taking property is analogous to compelling military service. "The right of eminent domain, as applied to property, is the same right, by whatever name it may be called, applied to persons when the exigencies of the country demand its exercise and require the services of persons for the common defense." Thus, the war power is introduced as part of the power of eminent domain.[152]

In the concluding two paragraphs, Justice Reeves infers from the Congress' other actions that it did not intend to make a contract. He closed the opinion by observing that, although some cases might lead to a moral obligation, a mere moral obligation was insufficient to serve as the basis of a legal right.

The Texas opinion is strange because of its philosophical approach and the construction of the final paragraphs. The later part of the opinion maps closely the structure of the Virginia opinion, but it treats in a much more summary fashion the arguments. One is left with the impression that Reeves had a particularly abstract approach to law and that he copied the

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[151] *Id.* at 723.

[152] *Id.*

Virginia opinion.

V. COMPARISONS

Important differences appear between the courts of the Confederacy. Georgia and Virginia emerge as deliberative courts, as does the dissent in North Carolina. Alabama and the North Carolina majority are less deliberative and more apt to rest upon extreme theories. Texas appears the most philosophical and most likely to try to reconcile the decision based on universal principles of constitutional and contract law. Those differences highlight a wide spectrum of opinions that existed during the Confederacy and appear to relate to ideological differences in the judges deciding the cases, ranging from the radical pro-war stance of Alabama's John Phelan to the more moderate stance of Virginia's Robertson and Georgia's Jenkins, through to the dissent of North Carolina's Pearson, who supported the war but protected individual rights even more.

In attempting to explain the opinions in the conscription cases, an initial question is why they were so willing to compel sacrifices among members of their community. Drew Faust argued in *The Creation of Confederate Nationalism* that the conservative doctrines emerged as the dominant mode of political theory in the Confederacy. There remained dissenters, of course, but the "forceful assertion of conservative doctrines as at once southern and sacred and the hegemonic effort to equate Yankeeism simultaneously with democracy and the Devil shaped the character of Confederate nationalism as it was promulgated by the pulpit, the stump, and the press."[153]

In the case of the conscription cases, the war exerted enough force to bend the traditional modes of interpretation. But besides the dire necessity, there were well-established doctrines that the judges were able to draw upon. Democratic thought significantly influenced the style of argument of the courts. The inalienable power doctrine, which Democratic justices on the United States Supreme Court popularized in the antebellum era, played a prominent role in several of the opinions, notably Virginia and North Carolina, and, to a lesser extent, Georgia. The doctrine that the state may do whatever is necessary to protect itself emerged as a very powerful doctrine in North Carolina and Alabama. But there remained a desire to protect individual rights. The Georgia opinion and the North Carolina dissent—and, to a lesser extent, Virginia and Texas—fit well into the constitutional tradition, subscribed to largely, though by no means exclusively, by Whig justices.

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[153] *See* FAUST, CONFEDERATE NATIONALISM, *supra* note 39, at 39.

The judges did not decide the conscription cases entirely in a vacuum. Their opinions occasionally indicate that they had some information—and in rare instances the entire text—of other courts. When the North Carolina justices decided *Gatlin v. Walton*, they were familiar with the opinions of the Virginia, Georgia, and Alabama courts. The Virginia opinion seems to be familiar with Georgia's opinions because it quotes a statement made by Monroe in 1841, when he was Secretary of War, which appeared first in the Georgia reports. In dealing with other issues of conscription, Chief Justice A. J. Walker of Alabama concurred in one case based on reports of North Carolina and Virginia that had already decided the issue, because he wanted uniformity of decisions.[154]

The various responses of the courts illuminate the differences in approaches of the judges. A check of their political affiliations shows the connection between the types of political beliefs and their modes of argument. The Democratic judges—Robertson of Virginia, Phelan of Alabama, and Reeves of Texas—used the doctrines of narrow construction of grants and inalienable power, as well as the necessity argument, which was popular across the political spectrum. Democrat Stone of Alabama illustrates a different variant of Democratic values, which was protective of individual rights, and which one might expect to see used more frequently by Whig judges.

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[154] Justice Robertson's coverage of the war powers in *Burroughs* echoes Jenkins' opinions in *Jeffers v. Fair*, 33 Ga. 347, 369-70 and *Daly*, 34 Ga. Supp. 38, 50; 57 Va. at 487. Likewise, the Alabama opinion in *Tate* quoted from Jenkins' *Jeffers* opinion. 39 Ala. at 267-68 (quoting Monroe as reported in *Jeffers*). Ex Parte Starke, 39 Ala. 475, 484 (June Term 1864) (Walker's reference to newspaper reports of other opinions).

The Whig judges also exhibited a variety of approaches. Moderate Whig Justices Jenkins and Pearson were less sanguine about relying upon necessity, but rather took more technical approaches to the issue. The two radical North Carolina justices who upheld the Act, however, were also Whigs (one was a radical pro-secessionist). They may represent a radical strain among the Whigs, which sought public order at the expense of public rights.[155]

In the realm of constitutional law there is a general consensus among historians that ideology plays a role in shaping decisions. Stephen Siegel, whose book length article provides a detailed taxonomy of judicial positions on vested rights, has attributed differences in doctrine to differences in judges' philosophical approach, rather than to their political differences. Recently William Fisher, taking an approach that implicitly recognized the influence of politics on constitutional law, has argued that much of nineteenth-century vested rights jurisprudence originated in the political thought of the Whigs. One implication of Fisher's work, however, is that styles of reasoning among Democratic and Whig judges were similar.[156]

But there remains no comprehensive study of reasoning styles among nineteenth century judges that will answer the question of whether judges affiliated with the Democratic and Whig parties differed in the way that they approached questions of vested rights, or any other issue.[157] The conscription cases under study here suggest that ideology—as measure by political affiliation and judicial statements—correlated with style of reasoning. It remains for further research to establish more clearly the relationship between political affiliation and the ways that judges write their opinions to justify their conclusions. The conscription cases under study here raised uncommon questions. It is, therefore, difficult to draw conclusions on the extent to which judges differed in their approach to common issues, such as torts, contracts, real property, and statutory interpretation. The answer to that question will serve to show much more clearly than is now available how political beliefs affected law; but based on the small sample of cases presented in this study, it appears that a broad variety of reasoning appeared in cases deciding the same issue, almost simultaneously.

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[155] *See* KOHL, *supra* note 41, at 77 (explaining Whigs as desiring public order over individual freedom).

[156] *See* Fisher, *supra* note 15; Siegel, *supra* note 9. *See also* NOVAK, *supra* note 17 (considering Whig and Democrat jurists as similar in the nineteenth century). Fisher focused upon one style of reasoning, the balancing of public good with private good, a doctrine particularly well-suited to Whigs' respect for private property rights. Democrats more easily adopted the constitutional arguments that states parted with no rights by implication, as a way of guarding states against corporations and other established wealth.

[157] *See* Herbert Ershkowitz & William G. Shade, *Consensus or Conflict? Political Behavior in the State Legislatures During the Jacksonian Era*, 58 J. OF AM. HIST. 591 (1971); Alfred L. Brophy, "Vested Rights in the Antebellum Southern State Courts: The Intersection of Ideology and Reasoning Styles," in "The Intersection of Property and Slavery in Southern Legal Thought from Missouri Com-

VI. CONCLUSION

The Confederate courts aggressively protected the right of the Congress to compel military service from its citizens. In particular, in order to defeat claims by men who had provided substitutes for service in the army that they were not liable to conscription, the Confederate courts relied upon a combination of arguments, ranging from the right of a state to protect itself against destruction and the doctrine that states part with their powers only by express grant to the more moderate doctrines of narrow construction of legislative grants and a narrow construction of the contracts clause. The courts applied a law that promoted the common good by restricting the rights of wealthy citizens.

The historian Don E. Fehrenbacher attributed the disastrous decline in morale in the final years of the Civil War to

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promise through Civil War" (Ph.D. dissertation in progress, Harvard University) (portraying differences between Democrat and Whig jurists in Southern states); GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 204 (1997) (discussing differences between Democrats and Whigs and employing phrase "entrepreneurial republicanism").

the extreme sacrifices made necessary by the war. Fehrenbacher pointed to the Confederacy's ultimate concession to free slaves and to require service from all its able bodied male citizens.[158] The radical opinions of North Carolina and Alabama, which rested their decisions on the emergency created by war, may have served to boost morale by sharing sacrifices. And the careful opinions of Georgia and Virginia emphasizing republicanism consistent with constitutionalism may have tried to allay fears of "military despotism." The opinions represent the different visions of their authors. Certain rebels may have felt that what they were fighting for was no longer worth the cost. While they might have lost what they were fighting for, Southerner obtained what their pre-Civil War doctrine had molded for them.

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[158] DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH chap. 3 (1989).

HMO CLASS ACTIONS: HOW TO KILL A GNAT WITH A HOWITZER

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The catalyst for this paper is the relatively recent but substantial changes in the way health care is provided and paid for in the United States. Historically, health care was provided on a fee-for-service model, and the providers and payors were distinct entities. A physician provided the treatment, and the bills typically were paid by an independent insurer pursuant to a contract of insurance. In the late 1960s and early 1970s, however, health care costs skyrocketed, prompting the development of alternative models for the delivery and financing of health care, including HMOs, preferred-provider organizations (PPOs), and other forms of managed care.

In a managed-care arrangement, enrollees generally receive comprehensive coverage for their health care needs in exchange for a fixed premium. The managed-care entity in turn arranges for its enrollees' care by hiring or otherwise contracting with providers. Since managed-care organizations almost invariably bear some or all of the financial risks associated with providing care to its enrollees, they have a strong incentive to control costs and provide preventive care. Several administrative devices advance these goals, including precertification review, a determination of medical necessity, and utilization review. More often than not these mechanisms are coupled with financial rewards to incentivize physicians to avoid expensive or unnecessary care.

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The number of HMOs and other managed-care organizations has proliferated rapidly in recent years. Concomitantly, numerous employers have abandoned fee-for-service programs and now sponsor ERISA[1] plans to provide health care to employees in a managed-care environment. The cost-containment strategies mentioned above are routinely used by HMOs and other entities participating in ERISA and non-ERISA plans. Significantly, the vast majority of those entities subject their providers to financial rewards and penalties as the costs of individual care rise and fall.

These historic changes predictably have sparked a legal war that now encompasses several battlefields: Congress, state courts and legislatures, the United States Supreme Court, the board rooms of Wall Street, and, more recently, several United States District Courts. The district courts have been asked to certify massive class actions against several of the country's largest HMOs. The class action weapons of choice include RICO,[2] ERISA, and a variety of state consumer protection statutes.

This paper will focus primarily on the legal issues and global implications associated with the HMO class action litigation and will conclude, with deference and respect to the author's REPAIR[3] colleagues, that the entire effort has all the earmarks of a classic shakedown. In the process, it also will examine briefly recent developments on several related fronts.

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[1] Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1994).

[2] The Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994).

[3] "REPAIR," an acronym for RICO and ERISA Prosecutors Advocating Insurance Company Reform, is the group of attorneys who initiated most of the important HMO class actions. Several members of the group are veterans of the tobacco litigation and are plowing their substantial earnings into the HMO litigation. Others appear to be passive investors.

I. UNITED STATES CONGRESS

One could argue persuasively that the plaintiffs' bar, the courts, and jurors are peculiarly ill-equipped to overhaul the American health care system and to identify meaningful alternatives to the delivery and financing mechanisms presently employed by managed care in this country. Congress is far better positioned to address the issues in a comprehensive and arguably more dispassionate way. Ironically, however, it has been a lack of guidance from Washington that increasingly has nudged the courts into the fray, but the stalemate may be broken and soon.

On July 15, 1999, the Republican-backed version of the "Patients' Bill of Rights"[4] passed the United States Senate by a vote of fifty-three to forty-seven. Three months later, on October 7, 1999, the so-called Norwood-Dingell bill[5] passed in the House of Representatives by a 275 to 151 margin. A comparison of the major differences between the two pieces of legislation appears in Appendix "A." At this writing, Senate and House conferees are engaged in what has proven to be a highly contentious conference committee to sort through the differences.

The political hot potato in this scenario is the right of a managed-care enrollee to sue his/her plan for damages. Norwood-Dingell would effectively lift ERISA's shield against most lawsuits[6] and allow physically or mentally injured patients to recover actual and punitive damages against HMOs and other managed-care entities. In contrast, the Senate version provides no new rights to sue. The debate is predictable and complex.

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[4] S. 1344, 106th Cong. (1999).

[5] H.R. 2990, 106th Cong. (1999).

[6] *Id.* § 302. Currently patients may sue under ERISA, but recovery generally is limited to the cost of denied treatment or equitable relief. A more complete discussion of these issues appears *infra* Section II.A.1.

Democrats and President Clinton, on the one hand, argue that expanding health plan liability ultimately will improve the quality of patient care. Opponents argue that enhanced rights to sue will result in higher health care costs with no demonstrable improvement in the quality of care. Congress thus finds itself on the proverbial horns of a dilemma: it can expand liability and risk destroying an employer-based health care system, or it can continue to shield plans and further incense the growing number of doctors and patients who are denied care.

Congress should move forward and the sooner the better. Despite the unfortunate timing (it's an election year), a comprehensive fix is needed, and only Congress can row that oar. The longer the delay the more patients and managed-care organizations will continue to suffer under an increasingly tangled web of conflicting court decisions, and the more tempted some well intentioned federal judge may be to certify a national class action to remedy perceived or real problems with managed care.

II. THE COURTS

As previously indicated, HMOs, PPOs, and other managed-care organizations find themselves squarely in the litigation bullseye. They are being sued for medical malpractice, both direct and derivative, breach of contract, breach of fiduciary duty and a plethora of plan administration transgressions. To appreciate the issues and potential significance of the HMO class actions fully, it is important first to understand generally how the courts are ruling with regard to managed-care issues. As the following case summaries demonstrate, the courts are all over the lot:

> *Levy v. Pacificare of California*[7]: The insured brought an action against an HMO and a physician provider group for breach of the duty of good faith and fair

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[7] 91 Cal. Rptr. 2d 340 (Cal. Ct. App. 1999)

dealing, breach of contract, breach of fiduciary duty, intentional and negligent infliction of emotional distress, as well as injunctive and restitution relief. The insured alleged that he was "wrongfully denied access to a second medical opinion concerning a cancer diagnosis and was then denied coverage for corrective surgery."[8] The trial court found that it lacked jurisdiction since the insured failed to exhaust administrative remedies required by the Medicare Act. The court of appeals affirmed, finding that the insured's state law causes of action were based on claims governed by the Act's exclusive administrative review provisions.[9] The court noted that "[t]he Act provides that such review is within the sole province of the Secretary of Health and Human Services, [thereby] ensuring [uniform determination] nationwide, rather than the disparate findings that would inevitably result if each state court could determine entitlement to benefits under the Act."[10] The court also held that while standing for the insured's claims may be in state law, the claims are "inextricably intertwined" with payment of benefits and arise under the Act.[11]

Pryzbowski v. U.S. Healthcare, Inc.[12]: The plaintiff patient brought a state law negligence action against a medical facility and the physicians who were participants in a HMO.[13] The plaintiff alleged that she suffered injuries when the defendants failed to obtain prompt approval for an out-of-network physician to perform her back surgery.[14] In granting the defendant's motion for summary judgment, the district court held that a claim for negligent delay in the utilization review, or pre-authorization process, even if alleged as a state law violation against the physician, would "relate to" an ERISA plan and, thus, be preempted.[15] The district court made the distinction that if a participant is challenging the quality of care that he or she received from the physician, the claim is not preempted.[16] The court further determined that the plaintiff's claims challenged the poor administration of the HMO's plan, specifically the failure to properly approve the request for the out-of-network physician to perform surgery, rather than the quality of care that the plaintiff received.[17]

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[8] *Levy*, 91 Cal. Rptr. 2d at 342.
[9] *Id.* at 349.
[10] *Id.* at 346.
[11] *Id.* at 346-47.
[12] 64 F. Supp. 2d 361 (D.N.J. 1999).
[13] *Pryzbowski*, 64 F. Supp. 2d at 361.
[14] *Id.*

Giles v. NYLCare Health Plans, Inc.[18]: The participant brought a wrongful death suit against her HMO for the death of her son.[19] The participant alleged that the HMO was negligent and vicariously liable in selecting the plan's physician providers.[20] The United States District Court for the Southern District of Texas granted the participant's motion to remand, and the HMO appealed.[21] The Fifth Circuit affirmed, holding that the district court did not abuse its discretion in remanding the supplemental state law claims since the district court had dismissed the participant's ERISA claims that provided the basis for original jurisdiction.[22]

Marcella v. Capital District Physicians Health Plan,

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[15] *Id.* at 369.
[16] *Id.*
[17] *Id.*
[18] 172 F.3d 332 (5th Cir. 1999).
[19] *Giles*, 172 F.3d at 335.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 339-40.

Inc.[23]: The participant sued her HMO in state court for breach of contract and intentional infliction of emotional distress.[24] The participant alleged wrongful refusal to reimburse her for surgery.[25] The HMO removed the case to federal court, and the district court denied the participant's motion to remand on the ground that the participant's claims were preempted by ERISA.[26] The district court then granted the HMO's motion for summary judgment, holding that the participant's claims arose out of the administration of benefits and that the participant sought relief for the allegedly wrongful denial of such benefits.[27]

Berthelot v. Travelers Insurance Co.[28]: The insureds brought a class action against their insurer and HMO to recover for failure to inform the insureds of their right to have a baseline mammogram.[29] The lower court maintained the defendants' exception of no cause of action and dismissed the insureds' case.[30] In affirming the lower court's dismissal, the appellate court held that Louisiana law did not create a duty on the part of the HMO to inform or disclose to plan participants their right to a baseline mammogram.[31]

Humana, Inc. v. Castillo[32]: The insureds brought an action against their HMO to recover for fraudulent omissions inducing them to enter contracts.[33] The insureds alleged that the HMO misrepresented and/or failed to disclose the terms of its arrangements with physicians, particularly with its affiliate primary physicians.[34] The HMO appealed the trial court's finding that the insureds' action qualified as a class action suit.[35] In reversing the trial court's class certification, the appellate court held that "class actions seeking relief from separate contracts on the basis of fraud, whatever the genesis of the fraud, are prohibited."[36] The appellate court stated that the rationale for the prohibition is what one person may rely upon in entering into a contract may not be material to another purchaser.[37]

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[23] 47 F. Supp. 2d 289 (N.D.N.Y. 1999)

[24] *Marcella*, 47 F. Supp. 2d at 290.

[25] *Id.* at 291.

[26] *Id.* at 292-93.

[27] *Id.* at 294.

[28] 735 So. 2d 692 (La. Ct. App. 1999).

[29] *Berthelot*, 735 So. 2d at 694.

[30] *Id.*

[31] *Id.* at 695-96.

[32] 728 So. 2d 261 (Fla. Dist. Ct. App. 1999).

[33] *Castillo*, 728 So. 2d at 262.

Parrino v. FHP, Inc.[38]: The participant brought an action in state court against an HMO, alleging that the HMO improperly denied his initial claim for proton beam therapy as a treatment for his brain tumor.[39] The HMO removed the case to federal district court, and the district court granted the HMO's 12(b)(6) motion to dismiss.[40] The Ninth Circuit affirmed, holding that ERISA preempted the participant's state causes of action alleging improper handling of claims for medical benefits under an ERISA plan.[41]

Redmond v. Secure Horizons Pacificare, Inc.[42]: The insured brought a bad faith action against an HMO for initial denial of coverage and delay of payment for reimbursement of surgery expenses.[43] The trial court sustained the HMO's demurrer and dismissed the case, finding that it lacked jurisdiction since the insured's causes of action arose under the Medicare Act.[44] The appellate court affirmed, holding that, since the insured's claims were "complaints regarding reimbursement" and such claims must be resolved under the administrative review process specified in the Medicare Act, the claims arose under the Medicare Act.[45]

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[34] *Id.* at 262-64.
[35] *Id.* at 264.
[36] *Id.*
[37] *Id.* at 265-66.
[38] 146 F.3d 699 (9th Cir. 1998).
[39] *Parrino*, 146 F.3d at 702.
[40] *Id.*
[41] *Id.* at 704-05.
[42] 70 Cal. Rptr. 2d 174 (Cal. Ct. App. 1997).

Byard v. QualMed Plans for Health, Inc.[46]: The participant brought a state court action against an HMO for failure to pre-certify timely the participant for surgery.[47] The HMO removed the case to federal district court, alleging the action was governed by ERISA.[48] The district court granted the participant's motion to remand, holding that the insurance plan was not an "employee benefit plan" governed by ERISA since membership in the plan was voluntary, the employer did not receive consideration in connection with the plan, the employer did not contribute to the plan, and the employer did not perform sufficient administrative duties with respect to the plan.[49]

Lancaster v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc.[50]: The participants filed a state court action, alleging medical malpractice against two physicians, vicarious liability and negligence against the HMO and the physicians' professional corporation, and fraud against all defendants.[51] The defendants removed the action to federal court and filed a motion to dismiss.[52] The participants then filed a motion to remand.[53] The district court dismissed the direct negligence and fraud claims against the HMO, finding that those claims were preempted by ERISA since the claims challenged an administrative decision that had the effect of denying benefits.[54] The district court also dismissed the negligence claims against the professional corporation as well as the fraud claims against both the professional corporation and the physicians.[55] However, the district court found that ERISA did not preempt the vicarious liability claims against the HMO and the professional corporation, finding that such claims were malpractice claims that afforded no basis for removal under the complete preemption doctrine.[56] Accordingly, the district court remanded the vicarious liability claims as well as the medical malpractice claims against the physicians to the Virginia state court.[57]

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[43] *Redmond,* 70 Cal. Rptr. 2d at 174.
[44] *Id.* at 175-76.
[45] *Id.* at 177-79.
[46] 966 F. Supp. 354 (E.D. Pa. 1997).
[47] *Byard,* 966 F. Supp. at 355.
[48] *Id.*
[49] *Id.* at 360-61.
[50] 958 F. Supp. 1137 (E.D. Va. 1997).

Ryan v. Fallon Community Health Plan, Inc.[58]: The participant brought a state court action against an HMO, alleging breach of contract and unfair and deceptive insurance practices based on the HMO's alleged refusal to cover the costs of the participant's liver surgery and related medical care.[59] The HMO removed the case to federal court and filed a motion to dismiss.[60] The participant then filed a motion to remand.[61] The district court denied the plaintiff's motion to remand and granted the HMO's motion to dismiss, holding that the participant's state common law breach of contract claims did not "regulate insurance" within the meaning of the ERISA savings clause and that the participant had no private cause of action under state law for the alleged unfair and deceptive insurance practices.[62]

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[51] *Lancaster*, 958 F. Supp. at 1138.

[52] *Id.* at 1139.

[53] *Id.*

[54] *Id.* at 1147.

[55] *Id.*

[56] *Id.* at 1145-46.

[57] *Id.* at 1150-51.

[58] 921 F. Supp. 34 (D. Mass. 1996).

[59] *Ryan*, 921 F. Supp. at 35-36.

[60] *Id.* at 36-37.

Ardary v. Aetna Health Plans of California, Inc.[63]: The heirs of a deceased plan participant brought a wrongful death action against an HMO in state court, alleging that the HMO improperly denied emergency medical services and misrepresented its managed care plan to the participant.[64] The HMO removed the case to federal district court and filed a motion to dismiss.[65] The district court granted the HMO's motion in a one page order without opinion.[66] On appeal, the Ninth Circuit reversed and remanded, holding that the plaintiffs' wrongful death cause of action could be brought in state court and did not require exhaustion of the Medicare Act's administrative review process since the action was not based on the Medicare Act because it did not seek to recover benefits.[67]

A. ERISA

For reasons probably related more to forum selection than substance, a centerpiece of HMO class action complaints is a claim that the HMOs breached their fiduciary duties under ERISA. At the class certification stage of the litigation, the courts will cautiously avoid delving into the merits of these claims.[68] Nevertheless, several recent decisions should prove comforting to the HMOs and ultimately may provide a basis for dismissal. A discussion of those cases, as well as a brief overview of ERISA mechanics, follows.

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[61] *Id.* at 37.

[62] *Id.* at 38.

[63] 98 F.3d 496 (9th Cir. 1996).

[64] *Ardary*, 98 F.3d at 498.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 449.

1. *ERISA Litigation Basics*

ERISA governs most employee benefit plans sponsored by private employers.[69] As a general proposition, all state laws that relate to those plans are preempted by the statute.[70] In addition, ERISA preempts state law claims for negligence or breach of contract by a managed-care entity in connection with the provision of plan benefits.[71] If ERISA applies, a plaintiff's remedies are limited to those provided by the Act.[72]

The statute flatly prohibits compensatory and punitive damage awards.[73] Indeed, a successful plaintiff is limited by ERISA to the recovery of unpaid benefits, attorney fees, and equitable relief.[74] Although ERISA-bound plaintiffs may obtain relief for breach of fiduciary duty, the Act generally limits their recovery to the benefits provided by the plan.[75]

As discussed in more detail below, several recently decided and important cases have involved health plans sued for personal injury.[76] In one group of cases, the plaintiffs alleged medical malpractice by a provider under contract to the plan and that the plan was vicariously liable for the alleged malpractice. Although the courts have not been entirely consistent, the current trend is to permit such cases to go forward in state court.[77] In a second group of cases, the plan has been sued because a denial of coverage or a delay in making a coverage decision allegedly has injured the plaintiff. In those cases, the courts generally have attempted to determine whether the allegations involve a benefit denial or the quality of the benefit provided by the plan.[78] Again without uniformity, the courts tend to permit quality of benefit cases to proceed in state court, but invoke ERISA preemption in benefit denial cases.[79]

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[68] *See* Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974) (finding that "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action").

[69] 29 U.S.C. §§ 1002(1)-(3), 1101, 1103 (1994).

[70] 29 U.S.C. § 1144 (1994).

[71] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987). *See also* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 62 (1987).

[72] 29 U.S.C. § 1132(a) (1994).

[73] Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985).

[74] 29 U.S.C. §§ 1132(g)(1), 1132(a)(1)(B) (1994); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1217 (8th Cir. 1981).

[75] *Dependahl*, 653 F.2d at 1216.

[76] Although the REPAIR complaints specifically disclaim any effort to recover for personal injury, a discussion of these cases is appropriate to an understanding of ERISA preemption issues. Other plaintiffs may seek to certify class actions in state court on the basis of state law claims, directly implicating those issues.

2. *Breach of Fiduciary Duty*

The decision of the United States Supreme Court to hear *Herdrich v. Pegram*[80] is significant in several respects. First, the Court hopefully will resolve an existing split among the Circuits regarding the scope of fiduciaries duties owed under ERISA.[81] Second, the Court undoubtedly will clarify the role that financial incentives and disincentives legally can play in managed care. Finally, the Court should explain for the first time the extent to which physician providers can be involved in the operations of PSOs and PSNs without subjecting themselves to ERISA's fiduciary duties. Given the potential significance of the Court's treatment of these issues[82] a thorough review of *Herdrich* is appropriate.

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[77] Rice v. Panchal, 65 F.3d 637, 645-47 (7th Cir. 1995) (holding that claims against administrator of plan under theory of respondeat superior based on malpractice of provider on list designated by plan, not on negligent selection of that provider, did not provide basis for removal); Pacificare of Okla., Inc. v. Burrage, 59 F.3d 151, 155 (10th Cir. 1995) (finding vicarious liability claims against HMO based on malpractice of one of its treating physicians in treating patient were not preempted); Dukes v. U.S. Healthcare, 57 F.3d 350, 361 (3d Cir. 1995) (holding medical negligence claims against HMOs improperly removed); *see also* Lupo v. Human Affairs Int'l Inc., 28 F.3d 269, 274 (2d Cir. 1994) (holding malpractice and breach of fiduciary duty claims based on doctor-patient relationship and infliction of emotional distress claim against managed psychotherapy care entity based on actions of its psychotherapist-employee improperly removed); Pappas v. Asbel, 724 A.2d 889, 894 (Pa. 1998), *petition for cert. filed sub. nom.*, 67 U.S.L.W. 3717 (U.S. May 13, 1999) (No. 98-1836) (holding vicarious liability malpractice claim against HMO based on delay in transferring patient to authorized facility was not preempted as "negligence laws have only a tenuous . . . connection with ERISA covered plans, . . . and therefore are not preempted").

[78] *See, e.g.,* Prihoda v. Shpritz, 914 F. Supp. 113, 118 (D. Md. 1996) (medical malpractice).

[79] *Dukes*, 57 F.3d at 361 (3d Cir. 1995) (allowing medical malpractice claims to go forward because claims do not involve denial of benefits due or denial of some other plan created right); Lazorko v. Pennsylvania Hosp., No. Civ. A. 96-4858, 1998 WL 512995, at *1 (E.D. Pa. Aug. 10, 1998) (allowing medical malpractice claim through vicarious liability to remain in state court).

[80] 154 F.3d 362 (7th Cir. 1998), *cert. granted*, 120 S. Ct. 10 (1998).

Cynthia Herdrich was covered by her husband's ERISA health and welfare plan. They subscribed to a "pre-paid health insurance plan" operated by Carle Clinic Association, P.C., Health Alliance Medical Plans, Inc. (HAMP), and Carle Health Insurance Management Co., Inc.[83] HAMP, an HMO owned and controlled by the physicians comprising Carle Clinic, had a contract with Carle Clinic pursuant to which Carle's physicians provided covered medical services to HAMP members.[84] Dr. Pegram, Herdrich's treating physician, was employed by Carle Clinic.[85]

On March 7, 1991, Dr. Pegram discovered an inflamed six by eight centimeter mass in Cynthia Herdrich's abdomen. According to the opinion,

> Pegram delayed instituting an immediate treatment . . . and forced her to wait more than one week (eight days) to obtain the accepted diagnostic procedure (ultrasound). . . . Ideally,

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[81] *Compare* Elhmann v. Kaiser Found. Health Plan of Tex., 198 F.3d 552, 556 (5th Cir. 2000) (holding no fiduciary duty on part of HMO to disclose physician compensation plan), *with* Shea v. Esensten, 107 F.3d 625, 629 (8th Cir. 1997) (holding HMO had fiduciary duty to disclose structure of referral). For a detailed discussion of these and related cases, see *infra* Section II.A.2.b.

[82] *Amici curiae* briefs have been filed by eager advocates all along the political spectrum, including the American Association of Health Plans, the Chamber of Commerce of the United States, the Washington Legal Foundation, the American Medical Association, and the Health Insurance Association of America. Copies of the briefs are available on Westlaw's "SCT-BRIEF" database.

[83] *Herdrich*, 154 F.3d at 365.

[84] *Id.* at 366 n.3.

[85] *Id.*

> Herdrich should have had the ultrasound administered with all speed after the inflamed mass was discovered . . . in order that her condition could be diagnosed and treated before deteriorating. . . [Herdrich's appendix ultimately ruptured and caused peritonitis], but Carle's policy requires [HAMP] plan participants to receive medical care from Carle-staffed facilities in what they classify as "non-emergency" situations. Because Herdrich's treatment was considered to be "non-emergency," she was forced to wait the eight days before undergoing the ultrasound at a Carle facility in Urbana, Illinois.[86]

When the peritonitis was uncovered and Herdrich required a surgical procedure, "Carle insisted that she have the procedure performed at its own Urbana facility, necessitating that Herdrich travel more than fifty miles from her neighborhood hospital in Bloomington, Illinois."[87]

Herdrich sued Dr. Pegram, Carle Clinic and HAMP, alleging causes of action for medical negligence and state law fraud. In an amended complaint filed after the case was removed to federal court, Herdrich "averred that the defendants breached their fiduciary duty to plan beneficiaries by depriving them of proper medical care and retaining the savings resulting therefrom for themselves."[88] More specifically, this claim focused upon an incentive structure described by the court as follows:

> The Plan dictated that the very same HMO administrators vested with the authority to determine whether health care claims would be paid, and the type, nature, and duration of care to be given, were those physicians who became eligible to receive year-end bonuses as a result of cost-savings. Because the physician/administrators' year-end bonuses were based on the difference between total plan costs (*i.e.* the costs of providing medical services) and revenues (*i.e.* payments by plan beneficiaries), an incentive existed for them to limit treatment and, in turn, HMO costs so as to ensure larger bonuses. With a jaundiced eye focused firmly on year-end bonuses, it is not

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[86] *Id.* at 374.
[87] *Id.*
[88] *Id.* at 366.

> unrealistic to assume that the doctors rendering care under the Plan were swayed to be most frugal when exercising their discretionary authority to the detriment of their membership.[89]

The Seventh Circuit, contrary to the district court, held that Herdrich had stated a claim under ERISA for breach of fiduciary duty.[90] In doing so, the court first concluded that all of the defendants, including the physicians who managed the plan, were ERISA fiduciaries[91]:

> The defendant-physicians managed the Plan, including the doctor referral process, the nature and duration of patient treatment, and the extent to which participants were required to use Carle-owned facilities. In fact, the board of directors consisted exclusively of the Plan physicians who were thus in control of each and every aspect of the HMOs governance, including their own year-end bonuses. And, like in *Harris Trust*, Herdrich pleaded that the defendants had the exclusive right to decide all disputed and non-routine claims. In our view, this level of control satisfies ERISA's requirement that a fiduciary maintain "discretionary control and authority." We can reasonably infer that Carle and HAMP were plan fiduciaries due to their discretionary authority in deciding disputed claims.[92]

Having found that the defendants were ERISA fiduciaries, the court concluded that the particular incentive structure in question created a conflict that gave rise to a breach of fiduciary duty claim.[93] With some measure of caution, the court explained:

> Our decision does not stand for the proposition that the existence of incentives automatically gives rise to a breach of fiduciary duty. Rather, we hold that incentives can rise to the

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[89] *Id.* at 372.

[90] *Id.* at 369.

[91] *Id.* at 370-71. ERISA defines the term "fiduciary" in 29 U.S.C. § 1002(21)(A) (1994).

[92] *Id.* at 370.

[93] *Id.* at 372.

> level of a breach where, as pleaded here, the fiduciary trust between plan participants and plan fiduciaries no longer exists (*i.e.* where physicians delay providing necessary treatment to, or withhold administering proper care to, plan beneficiaries for the sole purpose of increasing their bonuses).[94]

Given its broadside attack on cost containment mechanisms—an essential component of managed care—the Seventh Circuit's decision in *Herdrich* has the potential to destroy the delicate balance inherent in managed care (*i.e.* quality care and competitive price). As a consequence, health care inflation will soar, forcing many employers to limit or curtail benefits all to the detriment of the employee-patient. *Herdrich* should be reversed.[95]

B. Disclosure: A Split

As previously indicated, the REPAIR complaints allege that the HMO defendants breached their fiduciary duties under ERISA by failing to disclose to plan participants the details regarding financial incentives provided to primary care physicians rendering care to plan participants.[96] A split among the circuits arguably exists with regard to this important issue.

In *Shea v. Esensten*,[97] the court ruled that ERISA imposes a fiduciary duty "to disclose [a] referral-discouraging approach to health care."[98] The court elaborated:

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[94] *Id.* at 373.

[95] On June 12, 2000, the United States Supreme Court did reverse this decision. *See* Pegram v. Herdrich, 530 U.S. ____ (2000).

[96] It is interesting to note that individual plaintiffs are not personally likely to recover a penny if this claim succeeds. Although a plan participant may recover benefits due under a plan, 29 U.S.C. § 1132(a)(1)(B) (1994), and may seek to restore to the plan losses sustained as a result of a breach of fiduciary duty, 29 U.S.C. § 1132(a)(2) (1994), he or she cannot personally obtain monetary relief. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985). "Appropriate equitable relief" is available. Varity Corp. v. Howe, 516 U.S. 489, 515 (1996); *see also* 29 U.S.C. § 1132(a)(3)(B) (1994) (allowing recovery for "appropriate equitable relief").

[97] 107 F.3d 625 (8th Cir. 1997).

[98] *Shea*, 107 F.3d at 628. Mr. Shea had a heart problem, but his primary care physician declined to refer Mr. Shea to a cardiologist allegedly because Mr.

> From the patient's point of view, a financial incentive scheme put in place to influence a treating doctor's referral practices when the patient needs specialized care is certainly a material piece of information. This kind of patient necessarily relies on the doctor's advice about treatment options, and the patient must know whether the advice is influenced by self-serving financial considerations created by the health insurance provider. . . . Health care decisions involve matters of life and death, and an ERISA fiduciary has a duty to speak out if it "knows that silence might be harmful." When an HMOs financial incentives discourage a treating doctor from providing essential health care referrals for conditions covered under the plan benefit structure, the incentives must be disclosed and the failure to do so is a breach of ERISA's fiduciary duties.[99]

By way of contrast, the Fifth Circuit recently ruled in *Ehlmann v. Kaiser Foundation Health Plan of Texas*[100] that ERISA imposes no fiduciary duty on an HMO to disclose physician compensation schemes.[101] With little elaboration, the court reasoned that "[i]t is for Congress to determine whether to impose such a duty to disclose under ERISA."[102]

The *Ehlmann* court made a half-hearted attempt to distinguish *Shea* as a case involving "specific inquiry," *i.e.* Mr. Shea asked his doctor whether he should see a heart specialist.[103] Significantly, however, Mr. Shea never inquired about his doctor's compensation arrangement with the HMO, and the *Shea* court certainly did not purport to limit the scope of its

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Shea's plan incentivized that course of action; Mr. Shea died of a heart attack without ever seeing a cardiologist. *Id.* at 626.

[99] *Id.* at 628-29 (citations omitted). *Shea* has experienced a somewhat lukewarm acceptance by other courts. It has been followed, declined, and distinguished. *See, e.g.*, Brown v. American Life Holdings, Inc., 64 F. Supp. 2d 882 (S.D. Iowa 1998) (distinguished); Weiss v. CIGNA Healthcare, Inc., 972 F. Supp. 748 (S.D.N.Y. 1997) (declined); Drolet v. Healthsource, Inc., 968 F. Supp. 757 (D.N.H. 1997) (followed).

[100] 198 F.3d 552 (5th Cir. 2000).

[101] *Ehlmann*, 198 F.3d at 554-55.

[102] *Id.* at 555.

[103] *Id.* at 556.

ruling to cases involving "specific inquiry." Thus, a conflict seemingly exists.[104]

C. *Preemption: Another Split*

Numerous lower federal court decisions have acknowledged the fundamental distinction between ERISA plan administration and the practice of medicine. These cases typically distinguish claims based on "quantity of care" and "quality of care." The former implicate ERISA plan administration and, therefore, are preempted.[105] The latter, however, have been held to implicate medical decisions and are not preempted.[106] This seemingly clear line of demarcation has been blurred by two recent, but conflicting, decisions by the First and Third Circuit Courts of Appeals.[107] Until these cases are reconciled, the precise parameters of federal and state court jurisdiction to hear and decide managed-care liability cases will remain troublingly unclear.[108]

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[104] The conflict may or may not be resolved in *Herdrich*, which does not directly involve a disclosure issue. However, if the Supreme Court in *Herdrich* rules that providing financial incentives cannot amount to a breach of fiduciary duty under ERISA, it should logically follow that a failure to disclose those incentives would not amount to a breach either.

[105] *See supra* note 79 and accompanying text.

[106] *See, e.g.* Rice v. Panchal, 65 F.3d 637, 646 (7th Cir. 1995) (medical malpractice); Pacificare of Okla., Inc. v. Burrage, 59 F.3d 151, 154 (10th Cir. 1995) (medical malpractice); Dukes v. U. S. Healthcare, Inc., 57 F.3d 350, 361 (3rd Cir. 1995) (medical malpractice).

[107] *Compare* Danca v. Private Health Care Sys., Inc., 185 F.3d 1, 7 (1st Cir. 1999) (finding negligent precertification review claim preempted by ERISA), *with* Bauman v. U.S. Healthcare, Inc. (*In re* U. S. Healthcare, Inc.), 193 F.3d 151, 165 (3d Cir. 1999) (finding negligent adoption of hospital utilization policies and failure to provide in-home care not preempted by ERISA).

[108] It is not inconceivable that personal injury class actions will be filed against HMOs in state court. In that event, *Danca* and its progeny should play an important role in what should be a concerted effort by the defendant to relocate the litigation to an ERISA-bound federal court.

III. CLASS ACTIONS[109]

A "class action" is a procedural mechanism that allows a civil action to be brought by a large number of people who are so similarly situated that adjudicating their rights in a single case would be more efficient.[110] Courts have discretion in deciding whether or not to certify a class and may be reversed only for an abuse of discretion.[111]

A. Prerequisites

In every class action, the plaintiff(s) bears the burden of establishing each of the elements of Rule 23(a) of the Federal Rules of Civil Procedure. Those elements include: (1) numerosity—the class is so numerous that joinder is impracticable; (2) commonality—there must be some questions of fact or law common to the class; (3) typicality—the class representative's legal claim must be typical of those of the class; and (4) the class representative must fairly and adequately protect the interests of individual class members.[112] If the plaintiff fails to establish any one of the elements, a class action cannot be certified.[113]

The "numerosity" inquiry is particularly case specific. Rule 23(a)(1) requires that the class be so large that "joinder of all [class] members is impracticable," but not necessarily impossible.[114] By way of example, a class of forty has been deemed large enough to provide numerosity,[115] but a class of 350 has not.[116] Since the Rule is satisfied only by meeting the strict requirements of joinder, rather than by any magical minimum number, in any given case five class members may be adequate and a million may not.

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[109] Although most states have procedural rules that allow class actions, the scope of this paper will be limited to Federal Rule of Civil Procedure 23 and federal court decisions interpreting and applying the Rule.

[110] American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974) (stating that main purpose of class actions is efficiency and economy of litigation).

[111] Horton v. Goose Creek Ind. Sch. Dist., 690 F.2d 470, 483 (5th Cir. 1982) (describing action challenging school district's use of canine contraband detection program).

[112] FED. R. CIV. P. 23(a)(1)-(4).

[113] General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 161 (1982).

[114] FED. R. CIV. P. 23(a).

[115] Swanson v. American Consumer Indus., Inc., 415 F.2d 1326, 1333 n.9 (7th Cir. 1969).

Rule 23(a)(2)'s "commonality" requirement is less than rigorous.[117] Individual class members need not be identically situated.[118] Rather, it is sufficient if "resolution of the common questions [of law or fact] affect all or a substantial number of the class members."[119] By way of example, even if there are individual differences in damages, commonality exists if there are common questions regarding liability.[120]

The "typicality" prerequisite of Rule 23(a)(3) mandates that the class representative be typical of the entire class.[121] Typicality exists when the representative's legal theory is the same that an absent class member would advance if he/she were a party.[122] As with numerosity, typicality is not a demanding prerequisite.[123] Although it admittedly is hard to distinguish "typicality" and "commonality," the inquiries are separate and distinct.[124] Thus, the potential exists to have common claims in a case where the putative class representative is not similar enough to be typical of the class.[125] To make a typicality finding a court must conclude that the class representative, theoretically presenting all individual claims, will represent adequately the interests of all absent class members.[126]

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[116] Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (D. Cal. 1969).

[117] *See, e.g.,* Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986).

[118] *Jenkins*, 782 F.2d at 472.

[119] *Id.*; *see* Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982).

[120] *E.g.*, Blackie v. Barrack, 524 F.2d 891, 904-05 (9th Cir. 1975).

[121] FED. R. CIV. P. 23(a)(3).

[122] *See* Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977) (stating claims "typical" even if supported by varying facts).

[123] Forbush v. J.C. Penny Co., 994 F.2d 1101, 1106 (5th Cir. 1993).

[124] General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

[125] *Compare General Tel. Co.*, 457 U.S. at 161 (Title VII), *with* Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 662 (D. Minn. 1991) (sex discrimination).

[126] Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) ("[T]ypicality 'serve[s] as [a] guidepost for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class

Finally, Rule 23(a)(4) requires that the class representative and class counsel will adequately and fairly "protect the interests of the class."[127] This provision is designed primarily to ensure that a class representative or counsel does not have a conflict of interest that would impair counsel's representation or be detrimental to the interests of absent class members.[128]

Quite frankly, it is not likely that any putative HMO class will be defeated on the basis of Rule 23(a). As evidenced by the number of class actions certified by the federal courts in recent years,[129] the basic requirements for class certification are not

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members will be fairly and adequately protected in their absence.'") (citation omitted).

[127] The Rule is not particularly rigorous and requires only a prima facie, good faith belief by the trial judge that the class's interests will be protected. *But see* Hansberry v. Lee, 311 U.S. 32, 43-45 (1940) (finding due process violation binds absent class member in conflict with class representative).

[128] East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977); Horton v. Goose Creek Ind. Sch. Dist., 690 F.2d 470, 484 (5th Cir. 1982).

[129] *E.g., In re* Prudential Ins. Co. of America Sales Litig., 148 F.3d 283, 290 (3d Cir. 1998), *cert. denied,* 119 S. Ct. 890 (1999) (insurance); Walters v. Reno, 145 F.3d 1032, 1036 (9th Cir. 1998), *cert. denied,* 199 S. Ct. 1140 (1999) (INS due process); DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1175 (8th Cir. 1995) (banking); Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 63 (3d Cir. 1994) (child care services); Forbush v. J.C. Penny Co., 994 F.2d 1101, 1106 (5th Cir. 1993) (ERISA); Rosario v. Livaditis, 963 F.2d 1013, 1022 (7th Cir. 1992) (RICO); Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 546 (D.N.J. 1999) (Truth in Lending Act); Chisolm v. TranSouth Fin. Corp., 184 F.R.D. 556, 567 (E.D. Va. 1999) (RICO); Clark v. Retrieval Masters Creditors Bureau, Inc., 185 F.R.D. 247, 251 (N.D. Ill. 1999) (Fair Debt Collection Practice Act); Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54, 73 (D. Mass. 1997) (insurance); Kalodner v. Michael Stores, Inc., 172 F.R.D. 200, 211 (N.D. Tex. 1997) (securities fraud); Peterson v. H&R Block Tax Serv., Inc., 174 F.R.D. 78, 87 (N.D. Ill. 1997) (tax); Jane Doe I v. Karadzic, 176 F.R.D. 458, 463-64 (S.D.N.Y. 1997) (genocide); *In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 493 (S.D.N.Y. 1996) (antitrust); *In re* Copley Pharm., Inc., 161 F.R.D. 456, 458 (D. Wyo. 1995) (products liability); Rubenstein v. Collins, 162 F.R.D. 534, 539 (S.D. Tex. 1995) (fraud); Durrett v. John Deere Co., 150 F.R.D. 555, 563 (N.D. Tex. 1993) (usury).

Recent state court certifications include: Marr v. WMX Tech., Inc., 711 A.2d 700, 703 (Conn. 1998) (nuisance); Banks v. New York Life Ins. Co., 722 So. 2d 990, 997 (La. 1998) (insurance); Scott v. American Tobacco Co., 725 So. 2d 10, 17-18 (La. Ct. App. 1998) (tobacco), *cert. denied,* 731 So. 2d 189 (La. 1999); Peterson v. Dougherty Dawkins, Inc., 583 N.W.2d 626, 631 (N.D. 1998) (fraud); Cope v. Metropolitan Life Ins. Co., 696 N.E.2d 1001, 1009 (Ohio 1998) (insurance); Hamilton v. Ohio Sav. Bank, 694 N.E.2d 442, 459 (Ohio 1998) (banking); Black Hawk

difficult to establish. Therefore, the defendants in the HMO cases must focus their efforts on the additional requirements of Rules 23(b)(1)(A), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, as well as on the strong policy arguments that suggest that class certification is neither necessary nor appropriate. A discussion of those issues follows.

B. The Attack-Multiple Fronts[130]

The REPAIR plaintiffs seek class certification pursuant to Rules 23(b)(1)(A) and 23(b)(3) of the Federal Rules of Civil Procedure. Since future plaintiffs may seek a Rule 23(b)(2) class, all three sections will be analyzed.

1. Rule 23(b)(1)(A)

Assuming that each element of Rule 23(a) is proven, this section of the Rule authorizes a class if

> the prosecution of separate actions by . . . individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . .[131]

Taken literally, this section of the Rule would apply to any putative class action since any defendant facing multiple individual actions invariably is at risk for conflicting results. As a consequence, the courts have found it particularly difficult to

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Oil Co. v. Exxon Corp., 969 P.2d 337, 347 (Okla. 1998) (fraud); Rainbow Group, Ltd. v. Johnson, 990 S.W.2d 351, 361 (Tex. Ct. App. 1999) (breach of contract); Tana Oil & Gas Corp. v. Bates, 978 S.W.2d 735, 744 (Tex. Ct. App. 1998) (oil and gas).

[130] In addition to the issues discussed in this paper, defense counsel should evaluate the applicable statute of limitations, as well as issues related to the standing of the class representatives. *E.g.*, Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987) (holding, "[A] claim cannot be asserted on behalf of [the] class unless at least one named plaintiff has suffered the injury that gives rise to that claim"); Maio v. Aetna, No. CIV. A. 99-1969, 1999 WL 800315, at *2 (E.D. Pa. 1999) (finding lack of standing to assert RICO claims against HMOs).

[131] FED. R. CIV. P. 23(b)(1)(A).

develop any meaningful general rules regarding the scope of the Rule.

The courts have adopted a variety of strategies to limit the scope of Rule 23(b)(1)(A). First, for example, several courts have held that the Rule was not intended to authorize certification simply because in individual cases some plaintiffs will win and some will lose.[132] This approach, however, also has been rejected.[133] Second, some courts have held that the Rule does not apply to class actions seeking money damages.[134] This approach likewise has been rejected and may in fact represent the minority rule.[135] Finally, some courts refuse to apply the Rule in the absence of proof that a defendant in fact will be subject to incompatible standards.[136]

All three approaches find application to the REPAIR cases. Those plaintiffs seek money damages in the form of restitution. In addition, there likely will be no proof that an HMO defendant will be subject to incompatible standards if individual suits proceed. Although some plaintiffs may win and some may lose, they all are attempting to impose the same disclosure requirements on the HMOs. Therefore, Rule 23(b)(1)(A) should not be applied to the REPAIR or similar cases.

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[132] *E.g.* McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975) (airplane crash); Feinstein v. Firestone Fire & Rubber Co., 535 F. Supp. 595, 600 n.5 (S.D.N.Y. 1982) (product liability); Trecker v. Manning Implement, Inc., 73 F.R.D. 554, 557-62 (N.D. Iowa 1976) (antitrust).

[133] *In re* A. H. Robins Co., 880 F.2d 709, 752 (4th Cir. 1989), *abrogated by* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997).

[134] *E.g.*, Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1341 (9th Cir. 1976) (federal securities laws); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968) (conspiracy).

[135] *E.g.*, *In re* A. H. Robins Co., 880 F.2d at 752; Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 563 (E.D.N.Y. 1977) (civil rights); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 562 (S.D. Fla. 1973) (negligence); American Trading & Prod. Corp. v. Fischback & Moore, Inc., 47 F.R.D. 155, 158 (N.D. Ill. 1969) (negligence).

[136] *E.g.*, Ruland v. General Elec. Co., 94 F.R.D. 164, 165 (D. Conn. 1982) (negligence); Joseph L. v. Office of Judicial Support, 516 F. Supp. 1345, 1350 (E.D. Pa. 1981) (constitutional law); Chmieleski v. City Prods. Corp., 71 F.R.D. 118, 155-56 (W.D. Mo. 1976) (antitrust); Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 455 (M.D. Ga. 1975) (antitrust).

2. *Rule 23(b)(2)*

Future class action plaintiffs may seek to certify a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which authorizes a class if

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .[137]

Rule 23(b)(2) class actions were designed for civil rights cases involving large and frequently unascertainable classes of people seeking broad equitable relief.[138] However, 23(b)(2) classes are not limited to civil rights cases, and in recent years 23(b)(2) class certification has been sought in a wide range of other cases.[139]

The most frequent challenge[140] to 23(b)(2) certification is that the plaintiff seeks money damages for the class in addition to injunctive relief. In such cases, the court must make a determination as to whether the monetary relief is merely "incidental" to the requested injunctive or declaratory relief.[141] Since this predominance inquiry is discretionary no clear standards have developed across the country, and the case law is dangerously unpredictable.[142] In the Fifth Circuit, however, the law is crystal clear and potentially deadly to HMO plaintiffs.[143]

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[137] FED. R. CIV. P. 23(b)(2). The requirements of Rule 23(a) also must be satisfied.

[138] FED. R. CIV. P. 23 advisory committee's note.

[139] *See, e.g.,* Carson v. American Brands, Inc., 450 U.S. 79 (1981) (employment); *Chmielski,* 71 F.R.D. at 179 (antitrust); Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916, 940 (N.D. Miss. 1972), *aff'd on other grounds,* 492 F.2d 1123, 1141 (5th Cir. 1974) (environmental); Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160, 172 (S.D.N.Y. 1974) (securities).

[140] Other successful challenges have been based upon the representative plaintiff's ineligibility for individual injunctive relief, Marantette v. Michigan Host, Inc., 506 F. Supp. 909, 913 (E.D. Mich. 1980), or the fact that the judgment will inure to all class members even absent class certification, Wells v. Schweiker, 536 F. Supp. 1314, 1332 (E.D. La. 1982).

[141] *See, e.g.,* Smith v. Baltimore & Ohio R.R., 473 F. Supp. 572, 582 (D. Md. 1979) (labor).

[142] *Compare* Angelastro v. Prudential-Bache Sec., 113 F.R.D. 579, 583 (D.N.J. 1986) (injunctive relief not predominate), *and* Duran v. Credit Bureau, Inc., 93

In *Allison v. Citgo Petroleum Corp.*,[144] the Fifth Circuit flatly held that 23(b)(2) certification is inappropriate in any case in which the plaintiffs seek money damages awards to individual class members.[145] In doing so, the court explained that monetary damages are incidental to equitable relief only in very narrow circumstances:

> [S]uch damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.[146]

Individual damage awards simply do not fit the bill.[147]

Allison remains good law in the Fifth Circuit, and its rationale has been applied by several other courts.[148] Since the HMO plaintiffs' counsel are actively using the threat of astronomical damage awards to attempt to force the HMO defendants to settle, it should be abundantly clear to all concerned, including the courts, that money damages are the predominant

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F.R.D. 607, 609 (D. Ariz. 1982) (same), *with* Rivera v. Patino, 524 F. Supp. 136, 149 (N.D. Cal. 1981) (injunctive relief predominate), *and* Smith v. Baltimore & Ohio R.R., 473 F. Supp. 572, 582-83 (D. Md. 1979) (same).

[143] The REPAIR plaintiffs, for example, seek trebled compensatory damages for every member of the class.

[144] 151 F.3d 402 (5th Cir. 1998).

[145] *Allison*, 151 F.3d at 416.

[146] *Id.* at 415.

[147] *Id.* at 417-18.

[148] *See, e.g.*, Israel v. Avis Rent-A-Car Sys., Inc., 185 F.R.D. 372, 383-84 (S.D. Fla. 1999) (religious discrimination); Faulk v. Home Oil Co., 184 F.R.D. 645, 663 (M.D. Ala. 1999) (race discrimination); Woodell v. Proctor & Gamble Mfg. Co., No. Civ. 3:96-CV-2723-H, 1998 WL 686767, at *1 (N.D. Tex. Sept. 29, 1998) (product liability).

relief sought and, therefore, that a 23(b)(2) class would not be appropriate.

3. *Rule 23(b)(3)*

The REPAIR plaintiffs seek to certify a Rule 23(b)(3) class with regard to their RICO claims. Of the three subdivisions of Rule 23, this undoubtedly is the most comprehensive.[149] It authorizes certification when a class action is the "superior" method to adjudicate the controversy and common questions "predominate" over individual questions. As explained by the Rules Advisory Committee:

> Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. . . .
>
> The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device . . . .
>
> That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages [*e.g.* test cases or consolidation] . . . . To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition

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[149] In contrast to classes certified under subdivisions 23(b)(1) and 23(b)(2), a 23(b)(3) class involves notice to absent class members and an opportunity to opt out of the class. FED. R. CIV. P. 23(c)(2); *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 165 (1974) (discussing the notice required with Rule 23(c)(2)).

> of maintaining the class action, that the court shall find that the procedure is "superior" to the others in the particular circumstances.[150]

Since the predominance inquiry necessarily is case and fact specific, it is difficult, if not impossible, to state how it may be satisfied. It is possible, however, to describe what the test is not. First, it is not necessary for the common issues to be determinative of the entire case or even all issues of liability.[151] Second, the test does not require a court to compare mechanically the amount of court time that will be required to dispose of common and individual issues.[152] Likewise, a court is not required to compare the numerical totals of common and individual questions.[153] A single common question may predominate. Finally, a court cannot determine predominance simply by evaluating the relative significance of the individual and common questions.[154] With these general principles in mind, defense counsel certainly would be wise to study those cases in which the predominance requirement was not satisfied.[155]

The "superiority" requirement requires the court to balance several factors, including the factors listed in Rule 23(b)(3)(A)-(D),[156] the objectives of the Rule[157] and the availability of other methods to resolve the dispute.[158] The complexity of this balancing process precludes a comprehensive analysis of its components in this paper. Suffice it to say, however, defense counsel should realize that "manageability" has been the ground upon which courts most frequently conclude that a class action is not superior.[159]

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[150] FED. R. CIV. P. 23 advisory committee's note.

[151] *See* Eisenberg v. Gagnon, 766 F.2d 770, 786-87 (3d Cir. 1985) (securities); Aguirre v. Bustos, 89 F.R.D. 645, 649 (D.N.M. 1981) (labor); American Trading & Prod. Corp. v. Fischback & Moore, Inc., 47 F.R.D. 155, 157 (N.D. Ill. 1969) (mass tort).

[152] *See* Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581, 592-93 (E.D. Pa. 1975) (antitrust); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968) (same). *But see* B&B Inv. Club v. Kleinert's, Inc., 62 F.R.D. 140, 145 (E.D. Pa. 1974) (securities).

[153] Deutschman v. Beneficial Corp., 132 F.R.D. 359, 375 (D. Del. 1990) (securities); Haywood v. Barnes, 109 F.R.D. 581 (E.D.N.C. 1986) (labor).

[154] Gulish v. United States, 78 F.R.D. 515, 518-19 (W.D. Pa. 1978) (tax), *dismissed*, 594 F.2d 855 (3d Cir. 1979).

[155] *See, e.g.*, Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 456-59 (11th Cir. 1996) (ERISA); Liberty Mut. Ins. Co. v. Tribco Constr. Co., 185 F.R.D. 533, 537-41 (N.D. Ill. 1999) (insurance); Expanding Energy, Inc. v. Koch Indus., 132 F.R.D. 180, 183-84 (S.D. Tex. 1990) (RICO); *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 356 (D.N.J. 1997) (product liability); Buford v. H&R Block, 168 F.R.D. 340, 361 (S.D. Ga. 1996) (RICO); Harding v. Tambrands, Inc., 165 F.R.D. 623, 631 (D. Kan. 1996) (product liability); Hum v. Dericks, 162 F.R.D. 628, 641 (D. Haw. 1995) (mass tort); Doe v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466, 476 (N.D. Ill. 1992) (ERISA).

a. Castano

An attack of the REPAIR (or any other) plaintiffs' effort to certify a Rule 23(b)(3) class of persons asserting RICO claims should begin with the relatively recent decision in *Castano v. American Tobacco Co.*[160] Although factual differences certainly exist among *Castano* and the HMO cases, and *Castano* included state law claims arguably not present in the HMO cases, striking similarities exist, and *Castano's* overall philosophy should prove persuasive to a district judge considering class certification.[161]

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[156] The matters pertinent to the findings include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3)(A)-(D).

[157] The fundamental objectives of class actions are achieving economies of time and expense and promoting uniformity of decisions. FED. R. CIV. P. 23 advisory committee's note. *See generally In re* Greenman Sec. Litig., 94 F.R.D. 273 (S.D. Fla. 1982) (securities).

[158] These include, for example, consolidation and test cases.

[159] *See, e.g.,* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620-22 (1997) (mass tort); Buford v. H&R Block, 168 F.R.D. 340, 364 (S.D. Ga. 1996) (RICO); *In re* Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 386 (S.D.N.Y. 1996) (antitrust); Commonwealth v. Emily S., 158 F.R.D. 9, 15-16 (D.P.R. 1994) (mass tort); Davenport v. Gerber Prods. Co., 125 F.R.D. 116, 120 (E.D. Pa. 1989) (product liability); Gelman v. Westinghouse Elec. Corp., 73 F.R.D. 60, 69 (W.D. Pa. 1976) (securities); Boshes v. General Motors Corp., 59 F.R.D. 589, 602 (N.D. Ill. 1973) (consumer credit); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 608 (S.D.N.Y. 1982) (consumer credit).

[160] 84 F.3d 734 (5th Cir. 1996).

Castano was brought in the United States District Court for the Eastern District of Louisiana on behalf of all smokers and nicotine dependent persons and their families against seven major tobacco companies. It has been estimated that the proposed class would have included approximately fifty to ninety million Americans from all fifty states. The plaintiffs alleged that the defendant tobacco companies fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature. The complaint included nine causes of action: fraud, negligent misrepresentation, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, violation of state consumer protection statutes, breach of express warranty, breach of implied warranty, strict liability in tort, and redhibition under Louisiana law.[162]

The district court certified a class under Rule 23(b)(3) as to the issues of "core liability" and punitive damages only, leaving the issues of injury-in-fact, proximate cause, reliance, affirmative defenses, and compensatory damages to be decided on an individual basis.[163] On interlocutory appeal, a Fifth Circuit panel unanimously decertified the class, holding that Rule 23(b)(3)'s requirements of predominance and superiority had not been met.[164] In doing so, the court focused on four critical sub-issues.

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[161] *Castano* has been cited with approval by at least three other circuits. *See* Broussard v. Meineke Discount Muffler Shops, 155 F.3d 331, 342 (4th Cir. 1998) (fraud); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1230 (9th Cir. 1996) (products liability); Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1024 (11th Cir. 1996) (RICO). Of the more than 130 district court opinions that have cited *Castano*, only one has expressly rejected its holding. *See* Arch v. American Tobacco Co., 175 F.R.D. 469, 495 n.27 (E.D. Pa. 1997) (tobacco).

[162] *Castano*, 84 F.3d at 737.

[163] *Id.* at 740.

[164] *Id.* at 737.

(1) Rigorous Analysis

The *Castano* court stated that "[a] district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class. The decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of rule 23."[165] After announcing this general rule, the *Castano* court criticized the lower court for its failure to conduct a rigorous analysis of the predominance and superiority requirements of Rule 23(b)(3). Specifically, the court attacked the lower court's failure adequately to consider how variations in state law might affect predominance and superiority.[166]

Most of the causes of action alleged in *Castano* were state law claims; therefore, the laws of each of the fifty states potentially were at issue. The court held that a sufficient Rule 23(b)(3) inquiry required the district court to conduct a complete conflicts of law analysis to determine which states' laws would apply to which issues. As the court explained,

> [a] district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions.
>
> A requirement that a court know which law will apply before making a predominance determination is especially important when there may be differences in state law.[167]

Therefore, under *Castano* it is not enough for a district court simply to conclude that a conflicts analysis will not preclude a finding of predominance or superiority. Rather, the court must actually conduct the conflicts analysis before making a finding as to predominance and superiority.[168]

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[165] *Id.* at 740 (citations omitted).

[166] *Id.*

[167] *Id.* at 741 (citations omitted).

[168] *Id.* The district court also was criticized for its failure to look past the pleadings when determining whether common issues predominated over individual issues. *Id.* at 743-44. The Fifth Circuit held that a rigorous predominance analysis necessarily requires the district court to look past the pleadings in order to

(2) Novel or Immature Torts

Under *Castano*, a novel or immature tort necessarily will fail the predominance and superiority requirements of Rule 23(b)(3). The court defined a novel or immature tort as one that lacks "a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23."[169] Under this broad definition, a novel tort apparently includes both a new cause of action and an old cause of action applied to a new situation.[170]

A novel tort will always fail the predominance test because a district court will be unable to determine whether issues common to class members will predominate over issues unique to individual plaintiffs without a "prior track record" of individual cases with which to compare: "Absent knowledge of how addiction-as-injury cases would actually be tried . . . it [is] impossible for the [trial] court to know whether the common issues would be a 'significant' portion of the individual trials."[171] Therefore, when presented with a novel tort, a finding that common issues will predominate is simply too speculative.

The court also found with respect to a novel tort that a finding of superiority would require impermissible speculation. When determining whether resolution by class action is a superior means of adjudication, the courts typically look for a showing of judicial crisis, judicial efficiency, or a negative-value suit.[172] The Fifth Circuit addressed each situation in *Castano*.

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understand the claims, defenses, and relevant facts of the case. *Id.* at 744.

[169] *Id.* at 747.

[170] Recent Case, *Class Actions–Class Certification of Mass Torts–Fifth Circuit Decertifies Nationwide Tobacco Class*—Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), 110 HARV. L. REV. 977, 980 (1997).

[171] *Castano*, 84 F.3d at 745.

[172] *Id.* at 748.

(a) Judicial Crisis

If the class proponent can show that a denial of certification will result in an unmanageable proliferation of individual suits, a judicial crisis is said to exist. The *Castano* court, however, concluded that a finding of judicial crisis with respect to a novel tort is too speculative[173]: "Until plaintiffs decide to file individual claims, a court cannot, from the existence of injury, presume that all or even any plaintiffs will pursue legal remedies. Nor can a court make a superiority determination based on such speculation."[174]

(b) Judicial Efficiency

If the class proponent can show that class certification will result in a savings of judicial resources, then certification is said to promote judicial efficiency. With regard to this factor, the *Castano* court stated that

> [i]n the context of an immature tort, any savings in judicial resources is speculative, and any imagined savings would be overwhelmed by the procedural problems that certification of a *sui generis* cause of action brings with it.
>
> . . . .
>
> . . . Only after the courts have more experience with this type of case can a court certify issues in a way that preserves judicial resources.[175]

(c) Negative-Value Suit

If the potential recovery for a plaintiff is so insignificant that bringing suit is cost prohibitive, it is said to be a negative-value suit. The *Castano* court dubbed this factor "[t]he most compelling rationale for finding superiority in a class action."[176] However, the court found this element missing in

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[173] *Id.* at 747.
[174] *Id.* at 748.
[175] *Id.* at 749.
[176] *Id.* at 748.

Castano because the compensatory damages for each plaintiff were potentially high and most states provide for the recovery of punitive damages.[177] However, the court did not hold that the novelty of the tort precluded a finding of negative-value.[178]

(3) *Conflicts of Law*

Under *Castano*, a multi-state class action may fail the superiority prong of Rule 23(b)(3) simply due to the complexity of the requisite conflicts of law analysis.[179] The *Castano* class members, for example, were from all fifty states with each state potentially having different laws regarding the various common law actions at issue.[180] The court concluded:

> The complexity of the choice of law inquiry also makes individual adjudication superior to class treatment. The plaintiffs have asserted eight theories of liability from every state. Prior to certification, the district court must determine whether variations in state law defeat predominance. While the task may not be impossible, its complexity certainly makes individual trials a more attractive alternative and, *ipso facto*, renders class treatment not superior.[181]

(4) *Fraud*

Finally, and most importantly, *Castano* held that a class action fraud claim cannot be certified where individual reliance would be an issue.[182] The court reasoned that the individual issue of reliance necessarily would predominate any common issues of law or fact.[183]

Although certain aspects of its analysis were unique at the time, *Castano* is entirely consistent with a large body of cases recognizing that class certification is inappropriate in mass tort cases.[184] Likewise, the parallels between *Castano* and the HMO litigation are striking. First, the heart of the plaintiffs' RICO claims is fraud, and individual reliance probably will be an issue.[185] Second, the HMO litigation hardly can be characterized as mature given the relative dearth of RICO-based HMO cases filed or decided in this country. Finally, although the number of individual suits against HMOs admittedly has increased, few have involved fraud claims, and there certainly is no case load crisis facing the judiciary.

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[177] *Id.*

[178] *Id.*

[179] *Id.* at 749-50.

[180] *Id.* at 750.

[181] *Id.* at 749-50.

[182] *Id.* at 745.

[183] *Id.*

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[184] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997) (asbestos); Georgine v. Amchem Prod., Inc., 83 F.3d 610, 634 (3rd Cir. 1996) (asbestos); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1235 (9th Cir. 1996) (epilepsy drugs). *See also* Wish v. Interneuron Pharm., Inc., No. MDL 1203, CIV. A. 98-20594, 1999 WL 782560, at *14 (E.D. Pa. Sept. 27, 1999) (Fen-Phen); Emig v. American Tobacco Co., 184 F.R.D. 379, 395 (D. Kan. 1998) (tobacco); Cook v. Rockwell Int'l Corp., 181 F.R.D. 473, 480 (D. Colo. 1998) (hazardous substances); Fisher v. Bristol Meyers Squibb Co., 181 F.R.D. 365, 374 (N.D. Ill. 1998) (Stadol). *See also* Barreras Ruiz v. American Tobacco Co., 180 F.R.D. 194, 199 (D.P.R. 1998) (nicotine dependent persons); Arch v. American Tobacco Co., 175 F.R.D. 469, 496-97 (E.D. Pa. 1997) (smokers); Reilly v. Gould, Inc., 965 F. Supp. 588, 606 (M.D. Pa. 1997) (lead); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 100 (W.D. Mo. 1997) (smokers); Martin v. American Med. Sys., Inc., No. IP94-2067-C-H/G, 1995 WL 680630, at *10 (S.D. Ind. Oct. 25, 1995) (penile implants); Zampirri v. Acromed Corp., MDL No. 1014, CIV. A. 93-7074, 1995 WL 273597, at *12 (E.D. Pa. Feb. 22, 1995) (spinal fixation devices); Puerto Rico v. Emily S., 158 F.R.D. 9, 16 (D.P.R. 1994) (oil spill); Sanders v. Tailored Chem. Corp., 570 F. Supp. 1543, 1543 (E.D. Pa. 1983) (formaldehyde insulation); *In re* Tetracycline Cases, 107 F.R.D. 719, 736 (W.D. Mo. 1985) (Tetracycline); Caruso v. Celsius Insulation Resources, Inc., 101 F.R.D. 530, 539 (M.D. Pa. 1984) (formaldehyde insulation); Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 234 (D.S.C. 1979) (DES); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500, 501 (E.D.N.Y. 1975) (airplane crash); Causey v. PanAmerican World Airways, Inc., 66 F.R.D. 392, 399 (E.D. Va. 1975) (airline crash); Harrigan v. United States, 63 F.R.D. 402, 409 (E.D. Pa. 1974) (surgery).

[185] *E.g.*, *In re* Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 225 (W.D. Mich. 1998) (insurance fraud); Chin v. Chrysler Corp., 182 F.R.D. 448, 465 (D.N.J. 1998) (fraud); *In re* Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214, 225-26 (E.D. La. 1998) (fraudulent concealment); *In re* Ford Motor Co. Bronco II Prod. Liab. Litig., 177 F.R.D. 360, 375 (E.D. La. 1997) (fraud). To the extent the HMO plaintiffs' RICO claims are based on violations of state law, reliance will be an issue and the laws of multiple states will be in play. *See* Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1024 (11th Cir. 1996).

b. *Equitable Concerns*

The United States has gone class action mad. In recent years, representatives of marijuana-prescribing doctors, crack cocaine addicts, AOL internet users, and Hooters restaurant waitresses have filed or threatened to file class actions.[186] While the claims asserted against the HMOs arguably are more legitimate than these lunatic fringe cases, the latter underscore the absolute necessity for the courts to concern themselves with the fairness of certification. From a defense perspective, certification of a class definitely raises the stakes and places significant pressure on a defendant either to settle what may be a marginal case or to bet the company on a jury verdict in a single trial.

In the HMO litigation, another option is available: individual actions. There simply is no evidence that truly injured plaintiffs have been unable to obtain adequate and timely relief from HMOs or other managed care entities through individual cases. Under the circumstances, it simply is fundamentally unfair for the courts to allow the HMOs to be blackmailed with a class action.[187] As Judge Posner has observed, a court should think long and hard before assuming the "undue and unnecessary risk of a monumental industry-busting error in entrusting the determination of potential multi-billion dollar liabilities to a single jury."[188]

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[186] *See* Lisa Bachman, *Ex-Hooters Worker Suing Firm*, TAMPA TRIB., Jan. 22, 1997, at 7 (sexual harassment); Vern E. Smith, *On "Thugs" and Theology: Farrakhan Defends His Ties to Libya, Attacks the Press and Muses About Crack and the CIA*, NEWSWEEK, Oct. 21, 1996, at 44 (crack cocaine addicts); *Two South Floridians Sue America Online the Action Follows Lawsuits Filed in New York, Los Angeles and Chicago*, ORLANDO SENTINEL, Jan. 19, 1997, at B1 (AOL); Jennifer Warren, *Suit Seeks to Bar U.S. Sanctions for Prescribing Pot Courts: Doctors and Patients Fight Federal Attempt To Nullify Proposition 215, Saying that Not Allowing Physicians To Discuss Marijuana Violates 1st Amendment*, L.A. TIMES, Jan. 15, 1997, at A3 (marijuana).

[187] As reported in the national press, REPAIR's strategy is to "[r]aise the stakes so high that neither side can afford to lose . . . ." Adam Bryant, *Who's Afraid of Dickie Scruggs?*, NEWSWEEK, Dec. 6, 1999, at 46. Of course, individual class members have nothing to lose in the first place. The vast majority probably have suffered no injury in fact and will not commit a penny to the litigation.

[188] *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995).

IV. CONCLUSION

It remains to be seen who will be the first to achieve significant and comprehensive restructuring of managed care: the Congress, the judiciary, or individual state legislatures. What is clear, however, is that HMOs and other managed-care organizations should not be forced to negotiate under the threat of one or more class actions that serve no other legitimate purpose. The courts are wide open to individual plaintiffs with legitimate claims against HMOs, and successful plaintiffs can recover attorney fees under both RICO and ERISA. Until the landscape changes dramatically, there are no strong legal or equitable grounds to use Rule 23 as an economic vice grip.

APPENDIX A

TOPIC	S 1344	HR 2990
Scope	Varies by provision. Sections affecting 48 million patients in state-regulated plans include access to emergency room care; access to cancer clinical trials; a ban on gag rules; and access for women to obstetricians and gynecologists. Provisions affecting 124 million patients in group plans include internal and external appeals. Provisions affecting all 161 million privately insured people include access to breast cancer treatment and tax provisions.	Covers all 161 million privately insured Americans.
Liability	No provision.	Allows patients who claim they have been physically or mentally injured when denied care by their health plans to sue in state court for damages. Plans that have complied with external review decisions would not be subject to punitive damages, and any state caps on damages would apply.
Emergency Care	Guarantees treatment at any emergency room without preauthorization if a "prudent layperson" would deem it necessary, if plan covers emergency care. The plan would not necessarily be forced to cover care outside the emergency department.	Guarantees treatment at any emergency room without preauthorization if a "prudent layperson" would deem it necessary, if plan covers emergency care.
Gag Rules	Similar provision to House bill.	Bars plans from restricting what a doctor may tell a patient about treatment options.
Internal Appeals	Requires plans to respond within 30 days to a patient's internal appeal of a denial of coverage, and within 72 hours in urgent case. Any patient whose internal review is rejected could appeal to an independent reviewer.	Requires plans to respond within 14 days, unless an extension is granted, to a patient's internal appeal of a denial of coverage, and within 72 hours in urgent case. Any patient whose internal review is rejected could appeal to an external reviewer.

TOPIC	S 1344	HR 2990
External Appeals	A patient whose internal appeal is rejected could appeal to an independent, external reviewer who must issue a binding, final decision within 72 hours in case of an emergency. Otherwise, the general time limit is approximately 65 days. A patient would be informed within 30 days after that decision is made. If recommended treatment is not provided, patients could obtain it either within the plan or from another provider, and the plan would be liable for the charges and up to $10,000 in fines. To be appealed, one of the requirements would be that the treatment would have to be covered by the plan using its definition of medical necessity. A patient could appeal if he or she seeks a treatment that might be considered "experimental" in some instances.	Any patient whose internal appeal is rejected could appeal to an independent, external reviewer who must issue a binding, final decision within 72 hours in case of an emergency, or 21 days otherwise. Penalties could include federal court action, such as civil fines of up to $1,000 per day. Plans that repeatedly violate review decisions could be fined up to $500,000.
Medical Necessity	Independent review boards could consider, but not be bound by, doctor recommendations on medical necessity in handing down decisions.	Guarantees that doctors, not health plan officials, would determine what treatment is medically necessary. Patients could appeal an internal appeal decision that found a treatment medically unnecessary or experimental.
Women's Health	Allows women to receive routine gynecological care without a referral from their primary care physicians.	Allows women to receive routine gynecological care without a referral from their primary care physicians.
Access to Specialists	Requires plans that cover specialty care to allow patients access to specialists "in a timely manner," as determined by medical circumstances.	Requires plans that cover specialty care to provide referrals for such care when needed, including treatment by out-of-network providers if no appropriate specialist is available in the network.
Whistleblower Protections	No provision.	Medical professionals who report any actions by a plan affecting quality of care for patients would be protected. No plan could retaliate against a protected health professional.
Choice of Doctors	Allows workers for companies with 50 employees or more to visit doctors who are not in their plan's network. Plans could charge more for this option.	Permits patients to choose a point-of-service option if their plan does not offer such access to non-network providers. Plans could charge more for this option.
Access to Clinical Trials	Requires plans to cover routine patient costs associated with cancer clinical trials sponsored by the National Institutes of Health, the Department of Defense or Department of Veterans' Affairs.	Requires plans to allow certain patients access to clinical trials testing new treatments and cover routine costs of care.
Tax Provisions	Several similar provisions. Does not include HealthMarts and association health plans (AHP).	Expands a current pilot program for tax-exempt medical savings accounts. Also allows full deduction of long-term care insurance. The self-employed also would be able to deduct all of the costs of health insurance premiums. Allows groups to pool resources through entities known as HealthMarts or association health plans (AHPs) to buy more affordable insurance.

COMMENT

EXPLORING THE CONSTITUTIONALITY OF SUBSIDIZING POLITICAL SPEECH WITH MANDATORY STUDENT ACTIVITY FEES: *BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM V. SOUTHWORTH*

"I may not be able to say all I think, but I am not going to say anything I do not think."

Eugene V. Debs
June 1918
Speech in Canton, Ohio[*]

I. INTRODUCTION

Imagine that you are a freshman at a local public university, and that, after parting with hundreds of dollars for tuition, you are forced to pay a sizable student activity fee. Initially, you are disappointed in the extra expense—perhaps even skeptical about the fee's purpose—but you later learn that the fee ensures you myriad benefits that would not otherwise exist: free health care at the infirmary, a free copy of the student newspaper, access to equipment and facilities at the student fitness center, discounted admission to inter-collegiate athletic events, and other benefits that enhance your college experience.

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[*] A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT & MODERN SOURCES 1138 (H.L. Mencken ed., 17th prtg. 1980).

Next, imagine that you are strolling through campus one otherwise uneventful day when you notice a large gathering—mainly of the vocal and riotous sort. In the middle of the crowd, you notice a well known national activist engaging in boisterous propaganda. Meanwhile, the mob is steadily growing in size and intensity. You think to yourself how offended you are by the display since you are diametrically opposed to the political message being proclaimed. Would you be disappointed if you learned that the gathering was sponsored by a student organization that received a portion of mandatory student activity fees?

Such a problem could easily exist at any university where students are forced to pay activity fees, and the United States Supreme Court recently decided a case involving these issues.[1]

This comment will focus on the narrow issue of whether a university can force objecting students to fund organizations that engage in political and ideological activities, speech, and advocacy.[2] This comment will explore the jurisprudential framework that governs the analysis of this issue, discuss the holdings by lower courts in similar cases, interject public policy concerns that bear on this issue, and analyze the Supreme Court's recent holding.

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[1] On November 9, 1999, the United States Supreme Court heard oral arguments in a case where University of Wisconsin students challenged the school's policy of subsidizing student organizations that engage in political activity. Joan Biskupic, *High Court Hears Debate on Student Activity Fees; Free Speech at Issue in Wisconsin College Case*, WASH. POST, Nov. 10, 1999, at A03. On March 22, 2000, the Supreme Court rendered a decision in this case. Board of Regents of the Univ. of Wis. Sys. v. Southworth, 102 S. Ct. 1346 (2000).

[2] Ostensibly, the issue is limited to the context of public universities forcing such subsidization because private institutions are not state actors in such a situation. Roy Whitehead, Jr. & Walter Block, *Mandatory Student Fees: Forcing Some To Pay for the Free Speech of Others*, 20 WHITTIER L. REV. 759, 775 (1999).

II. BACKGROUND

A. The Supreme Court and Forced Contribution Analysis

First, we must acknowledge two corollaries to free speech[3] that the Supreme Court has established: the right not to speak[4] and the right not to be compelled to subsidize the speech of others.[5] Although challenges to the subsidization of political groups with student activity fees is a relatively recent issue,[6] the Court has firmly established tests and standards in analogous situations of forced contributions.[7]

In *Abood v. Detroit Board of Education*,[8] the United States Supreme Court addressed the constitutionality of an "agency shop" provision in a collective-bargaining agreement, which required teachers who had not joined the union to pay, as a condition of employment, a fee in an amount equal to union dues.[9] Several teachers filed suit to challenge the provision, alleging that they were unwilling to join the union, opposed collective-bargaining in the private sector, and objected to certain political and economic activities in which the union was engaged.[10] The Court held that the agency shop clause was constitutional insofar as union expenditures were used to support activities germane to the union's primary purposes.[11] The Court reasoned that compelled association was justified by the desirability of labor peace and the need to prevent non-contributors from obtaining benefits brought about by union endeavors, i.e., "free-riding."[12] However, the Court also held that the Constitution required the union to use non-objecting employees' contributions to fund political and ideological causes not germane to the union's purposes.[13] The reasoning underlying the majority opinion was that the First Amendment's protection of free speech and free will prohibited mandating such contributions—under the threat of lost employment—and then using the proceeds to fund political activities.[14]

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[3] Freedom of speech is guaranteed by the First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[4] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The Court held that the school board could not compel students to salute the American flag and recite the pledge of allegiance, for the First Amendment protected individual "intellect and spirit" from official control. *Barnette*, 319 U.S. at 642. The Court eloquently stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

[5] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (holding that union may spend funds for political issues and other causes not germane to purposes that justified compelled association, i.e., collective-bargaining, so long as such expenditures are not financed by employees who object to views being advanced or those forced to do so against their will in order to retain their jobs). *See also* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (holding that State Bar may not use objecting members' fees to fund activities of an ideological nature that do not meet purposes justifying compelled association: namely, legal profession regulation).

[6] In a 1995 case deciding whether a university could refuse to subsidize a student publication due to its religious content, Justice O'Connor acknowledged the possibility of a free speech challenge by a student who did not want his or her mandatory student fees contributing to such speech activity. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 851 (1995) (O'Connor, J., concurring).

[7] The majority opinion in *Rosenberger* stated that the issue of an objecting student's rights was not before the Court and then referred the reader to Supreme Court cases involving forced contributions and individual objections thereto. *Rosenberger*, 515 U.S. at 841.

[8] 431 U.S. 209 (1977).

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[9] *Abood*, 431 U.S. 209, 211-12. No teacher was required to join the union, support the cause of unionism, or participate in union affairs. *Id.* at 212.

[10] *Id.* The plaintiffs' primary complaint was that the agreement deprived them of the freedom of association as guaranteed by the First Amendment. *Id.* at 213.

[11] *Id.* at 225-26. The primary purposes of the union were collective-bargaining, contract administration, and grievance adjustment. *Id.*

[12] *Id.* The Court believed there was a common cause between union and non-union teachers; thus, both groups should pay for activities that benefit their unified purposes. Whitehead & Block, *supra* note 2, at 765. *See* Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956) (holding that First Amendment not violated by requiring all who benefit from collective-bargaining to support it financially).

[13] *Abood*, 431 U.S. at 235-36. The Court stated that the First Amendment stands for the proposition that "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-35. *See* Elrod v. Burns 427 U.S. 347, 356-57 (1976) (holding that First Amendment principles do not permit State to compel association with political party). Also, it should be noted that the concept of germaneness first arose in an earlier case where dissenting employees challenged compelled funding under the Railway Labor Act, not the First Amendment. *Railway Employees' Dep't*, 351 U.S. at 235.

[14] *Abood*, 431 U.S. at 235. In *Buckley v. Valeo*, 424 U.S. 1, 22 (1976), the

In *Keller v. State Bar of California*,[15] the Supreme Court considered whether the Constitution was violated when the State Bar financed political and ideological activities with mandatory membership dues.[16] Numerous members of the State Bar filed suit, alleging that the use of mandatory fees to finance political activities with which they did not agree violated their rights guaranteed by the freedom of speech and association.[17] By way of reasoning similar to that seen in *Abood*, the Supreme Court held that the State Bar could not use an objecting member's contributions to fund activities that were not germane to the purposes that justified compelled association, i.e., the State's interest in improving legal services and regulating the legal profession.[18] Acknowledging the difficulty of defining the class of activities that were not "germane," the Court stated that the guiding principle is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose[s]" that justify compelled association.[19]

Court held that limiting or prohibiting contributions to organizations for political activities violated the First Amendment. Here, the Court stated that compelled contributions likewise raised First Amendment concerns. *Abood*, 431 U.S. at 234.

[15] 496 U.S. 1 (1990).

[16] *Keller*, 496 U.S. at 4-5. The State Bar was created under California law, it was comprised of attorneys who had to pay dues in order to practice in the state, and its purpose was to regulate the legal profession. *Id.*

[17] *Id.* at 5-6. The case went from a state trial court to the California Supreme Court, where the State Bar was held to be a government agency and the challenged activities were not unconstitutional. *Id.* at 6-7. Following this, the plaintiffs were successful in obtaining a grant of certiorari from the United States Supreme Court. *Id.* at 7.

[18] *Id.* at 13-14. For the analysis supporting this holding, see *supra* notes 13-14 and accompanying text. As far as the freedom of speech and the freedom of association underlying the dissenting members' arguments, the two really are one and the same, for the right of association was derived from the freedom of speech. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (holding that freedom to associate for advocating ideas and beliefs is part of Fourteenth Amendment's protection of liberty, which embraces freedom of speech). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.41 (5th ed. 1995) (explaining that freedom of association derived from freedom of speech). Consequently, when courts and commentators state that activities must be germane to the purposes of the group that compels *association*, the issue and analysis still involve the freedom of *speech*. *Id.*

[19] *Keller*, 496 U.S. at 14. Thus, in *Keller*, the challenged expenses must have

The *Abood* and *Keller* analysis, often referred to as the "germaneness" analysis, underwent an evolution of sorts in *Lehnert v. Ferris Faculty Ass'n.*[20] In *Lehnert*, several faculty members objected to union expenditures of their service fees for activities they believed were beyond the union's primary purpose of collective-bargaining.[21] A synopsis of its earlier holdings in this area prompted the Court to delineate a three-prong test for determining the constitutionality of union expenditures found to be objectionable by employees who were forced to contribute funds.[22] The Supreme Court held that to avoid constitutional concerns, activities chargeable to *all* contributors must "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[23] This test has recently been reaffirmed,[24] and its applicability in the area of objectionable political expenditures of mandatory student fees appears to be unquestionable.[25]

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been necessarily or reasonably incurred for the purpose of improving legal services or regulating the legal profession. *Id.* For this guiding principle the Court looked to a similar case where it was held that the proper test must be whether expenditures were necessarily or reasonably incurred for the purposes that justified compelled association. Ellis v. Brotherhood of Ry, Airline & S.S. Clerks, 466 U.S. 435, 448 (1984). In *Ellis*, the purpose justifying compelled association was labor management since the union was the employees' exclusive representative in discussions with the employer. *Ellis*, 466 U.S. at 448. It should be noted that *Ellis* also stands for the proposition that *Abood* applies to employees in the private sector and limits *Abood* in that non-political activities, even those not related to collective-bargaining, may be financed with membership dues. *Id.* at 455-57.

[20] 500 U.S. 507 (1991).

[21] *Lehnert*, 500 U.S. at 513. Once again the Court squarely faced the issue of what activities a union may charge to dissenting employees without violating the latter's constitutional rights. *Id.*

[22] *Id.* at 519.

[23] *Id.* The Court reviewed the standards set forth in *Abood* and *Keller* as well as earlier objections to forced contributions that were brought under the Railway Labor Act. *Id.* at 514-19.

[24] *See* Airline Pilots Ass'n v. Miller, 523 U.S. 866, 879 (1998).

[25] The test's critical elements—germaneness, the government's vital policy interests, and burdening free speech—would obviously be tailored to the facts of the particular case. For circuit courts of appeal holdings utilizing these standards

B. Lower Court Decisions Involving Student Fees

Several circuit courts of appeal and a state supreme court have decided cases involving an objecting student's challenge to expenditures of mandatory student fees[26] on political and ideological speech, activities, and advocacy. It should be noted that no two schools distribute and regulate activity fees in an identical manner and the ultimate effect of such differences remains to be seen.[27]

1. Circuit Courts of Appeal

a. Challenges to the Funding of Newspapers

(1) The Fourth Circuit

In *Kania v. Fordham*,[28] the Fourth Circuit had to decide whether the use of mandatory student fees to help fund the student newspaper violated the constitutional rights of students objecting to views espoused therein.[29] The objecting students relied on the holding in *Abood* to attack the process.[30] The court held that partially funding the newspaper

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in cases involving objections to the use of mandatory student fees, *see* discussion *infra* Part II.B. Moreover, these decisions were seemingly correct in their choice of authorities for the standards that govern this scenario in light of certain hints dropped by the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Dictum in the majority opinion, as well as in Justice O'Connor's concurrence, made reference to *Abood* and *Keller* after mentioning the prospect of a student challenging the constitutionality of certain expenditures of mandatory student fees. *Rosenberger*, 515 U.S. at 841, 851. *See also* Whitehead & Block, *supra* note 2, at 766-67; Matthew I. Weinstein, Note, *I'm Paying for That?—Assessing the Constitutionality of Mandating Student Activity Fees To Support Objectionable Political and Ideological Activities at Public Universities in* Southworth v. Grebe, 44 VILL. L. REV. 257, 274 & n.87 (1999).

[26] The Supreme Court has held that assessing student fees to fund student organizations and other and extra-curricular activities in general is constitutional. *See* Widmar v. Vincent, 454 U.S. 263, 265 (1981).

[27] *See infra* notes 38, 49 and Part II.B.3.

[28] 702 F.2d 475 (4th Cir. 1983).

[29] *Kania*, 702 F.2d at 476-77. The student-run newspaper at the University of North Carolina, *The Daily Tar Heel*, received a significant portion of its funding from student fees and could not operate at its ordinary capacity without such funds. *Id.*

[30] *Id.* at 478-79. The objecting students argued that *Abood* was directly analo-

with mandatory student fees did not violate the constitutional rights of the objecting students.[31] Under the *Abood* analysis, the court reasoned that the newspaper was an activity germane to the University's central purpose of education and that the funds were not advancing ideological viewpoints of the University.[32]

(2) The Fifth Circuit

In *Hays County Guardian v. Supple*,[33] the Fifth Circuit confronted another challenge to the use of mandatory fees to fund a student-run newspaper.[34] Employing the *Lehnert* analysis, the court phrased the narrow issue as whether the newspaper furthered the government's vital policy interest in education.[35] Finding the newspaper's educational character to be indisputable, the court held that subsidizing the newspaper with mandatory fees did not violate the First Amendment rights of the objecting students.[36]

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gous to their situation. *Id.*

[31] *Id.* at 481. In so holding, the court also determined that *Abood* had not hindered the viability of a similar case decided prior to *Abood. Id. See* Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

[32] *Kania*, 702 F.2d at 479-80. The court believed that funding the newspaper, being an independent student publication, was not analogous to funding ideological activities as seen in *Abood*; rather, such was analogous to permissible expenditures that were central to the union's purpose and non-political in nature. *Id.* at 479-80 & n.8. The court also noted that the objectionable communications in *Abood* were one sided and that dissenters had no input or control; in contrast, the newspaper allowed for broad input and the exchange of ideas. *Id.* at 480.

[33] 969 F.2d 111 (5th Cir. 1992).

[34] *Supple*, 969 F.2d at 114, 122. This case involved students at Southwest Texas State University, and the student-run paper was known as the *University Star*. *Id.* at 114.

[35] *Id.* at 123. The court added that the interest should be advanced in a narrowly tailored manner. *Id.* The court also reiterated that forcing an individual to subsidize speech alone did not violate the First Amendment; only when the government forces contributions in support of the ideological expressions of others is the First Amendment offended. *Id.*

[36] *Id.* The court identified the ability to gain firsthand journalism experience as the primary educational virtue of a student-run newspaper. *Id.* The court also found the University's subsidization of the newspaper to be a narrowly tailored method of advancing educational interests. *Id.*

b. Challenges to the Funding of Private Organizations

(1) The Third Circuit

In *Galda v. Rutgers*,[37] the Third Circuit had to decide if Rutgers, the state university of New Jersey, could impose a mandatory, refundable fee for the specific purpose of funding the New Jersey Public Interest Research Group (PIRG), an independent organization engaging in political and ideological activities, without violating the First Amendment.[38] The court held that the University failed to prove that the educational function served by PIRG was more than incidental to its ideological component[39] and that no compelling state interest was shown to justify infringement upon First Amendment rights.[40]

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[37] 772 F.2d 1060 (3d Cir. 1985) (Galda II).

[38] *Galda II*, 772 F.2d at 1061-62. The fee assessment was $3.50 for each enrolling student; students not wanting to support PIRG had to request a refund, which was typically returned several months following the request. *Id.* at 1062. Although $3.50 per student may not seem like much money, PIRG received over $800,000 from these mandatory assessments in a 12-year period and averaged over $100,000 per year during the few years prior to the litigation. *Id.*

It should be noted that because of the way the court phrased the question presented the applicability of this court's holding to situations where general student activities fees fund several independent groups is debatable. *Id.* at 1064. The facts differ, but the analysis should be much the same in either instance. For reconciliation of factual differences and the effect of such differences see *infra* note 49 and Part II.B.3.

[39] *Galda II*, 772 F.2d at 1066. Obviously, this strikes at the heart of the *Abood* analysis, which permits the use of an objecting individual's fees only when the expense is in furtherance of the purposes that justify compelled association. *See supra* notes 13, 14, and 18 and accompanying text. Here, the court stated that the educational component of PIRG could not be separated from its ideological pursuits; thus, the end result was that compelled association could not be justified. *Galda II*, 772 F.2d at 1066.

[40] *Id.* at 1068. In response to the compelling interests proffered by the University, the court found no "free rider" problem to exist, that the University's role of presenting a variety of ideas was not furthered by the PIRG arrangement, and that no proof was made that the educational experience could not be gained by other means that were not offensive to the dissenting students' constitutional rights. *Id.* at 1067-68. The court stated that it had previously found the refund procedure to be unsatisfactory. *Id.* at 1068. *See* Galda v. Bloustein, 686 F.2d 159, 163 (3d Cir. 1982) (Galda I) (holding that objecting students could not constitutionally be forced to undertake even relatively modest burdens such as requesting

(2) *The Second Circuit*

In *Carroll v. Blinken*,[41] the Second Circuit decided the issue of whether a university's interest in education justified compelled contributions, by way of mandatory student fees, to an independent ideological group.[42] Students at the State University of New York at Albany (SUNY Albany) objected to having a portion of their mandatory student fees fund the New York Public Interest Research Group (NYPIRG).[43] The court held that the fee distribution was constitutional, reasoning that certain educational interests[44] collectively justified the constitutional infringements that occur when NYPIRG receives a portion of the student fees.[45] The court stated that these vital educational interests would be served less effectively without the regulations permitting the activity fee distribution.[46] However, the court held that NYPIRG must spend as

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refunds).

[41] 957 F.2d 991 (2d Cir. 1992) (*Carroll I*).

[42] *Carroll I*, 957 F.2d at 995. Having noted that the group in question was unquestionably political and ideological in character, the court phrased the dispute in terms of the objecting students' right to be free of compelled speech versus the University's educational mission to support a wide variety of speech and activities. *Id.* at 994-95. A secondary issue to be resolved was whether the group could claim all students as members simply by virtue of having paid their student fees, a portion of which subsidized the group. *Id.* at 995, 1003.

[43] *Id.* at 995. Students at SUNY Albany were required to pay a non-refundable student fee of $55 per semester, as of 1989, and $3 of each student's fee, or roughly $57,000 per year, went to NYPIRG. *Id.* at 993. NYPIRG has chapters at all of SUNY's campuses, and its total annual budget in 1989 was $2.7 million dollars, nearly 30% coming from mandatory student fees in the SUNY system. *Id.* at 993-94. All of NYPIRG's funds were commingled; therefore, the student fees helped pay all of NYPIRG's bills and activities. *Id.* at 994.

[44] SUNY Albany contended three main interests were furthered by allotting portions of fees to NYPIRG: (1) promoting extracurricular life, (2) transmitting of necessary skills (e.g. reading, writing, speaking and researching) and a sense of civic duty, and (3) stimulating energetic debate on campus. *Id.* at 999-1001.

[45] *Id.* at 1001. The court also held that NYPIRG could only claim as members those who consented to such membership and not those who simply paid an activity fee. *Id.* at 1003.

[46] *Id.* at 1001. The court stated that the compelled association would be upheld if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 999 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). When the court concluded that the inter-

much money on its SUNY Albany activities as it takes in from SUNY Albany.[47] The opinion reasoned that this mandate ensured that objecting students' fees support only NYPIRG functions at SUNY Albany and not functions unrelated to the SUNY Albany campus or its students.[48]

(3) The Seventh Circuit

Perhaps the most notable[49] circuit court of appeal deci-

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ests were better served with the regulation, it is not entirely clear whether the court implicated the entire fee distribution system or just the distributions to NYPIRG; the analysis included references to groups in general while the question presented ostensibly only addressed NYPIRG. *Id.* at 999-1001. Perhaps the court intended to be vague in this regard: If the holding was limited to the facts of NYPIRG's educational virtues, then countless other suits would be needed to resolve the matter for other groups.

[47] *Id.* at 1002. The court stated that this restriction was consistent with the principle that even the slightest of burdens on free speech must be narrowly tailored. *Id. See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 69 & n.7 (1981) (holding that zoning laws, as must all other laws, must be narrowly tailored to further substantial government interests when they infringe upon protected rights).

[48] *Carroll I*, 957 F.2d at 1002-03. In *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) (Carroll II), the court had to clarify its holdings in a few respects. The requirement that NYPIRG spend as much on its SUNY Albany activities as it took in from there did not impose a strict geographical limit on expenditures; SUNY Albany interests could be furthered in some off-campus expenditures, while some on-campus expenditures might not be justified. *Carroll II*, 42 F.3d at 127-28. Most of the appellate review in *Carroll II* involved challenges to the rather complex system of enforcement devised by the district court that was to ensure compliance with the court's earlier constitutional mandates. *Id.* at 126-29.

[49] The notoriety of this case stems from the fact the United States Supreme Court granted certiorari to hear the appeal from the circuit court's decision. *See supra* note 1. In the oral arguments heard by the Supreme Court on November 9, 1999, the Board of Regents encouraged the Court to analyze the issue under the reasoning in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 825-27 (1995), which held that once a limited public forum was created its availability had to be determined on a content-neutral basis. *See* Biskupic *supra* note 1, at A03. Moreover, several justices asked questions indicating that the Court may be interested in the public forum analysis to some degree. *Id.* For an analysis of the public forum doctrine, see *Rosenberger*, 515 U.S. at 828-37.

From the perspective of anticipating the Supreme Court's ultimate resolution of the issue, the likelihood of such an analysis being appropriate seemed modest for two reasons. First, the Court made reference to *Abood* and *Keller* when it hypothesized of student challenges to the fees in its *Rosenberger* opinion. *See* sion in this area is *Southworth v. Grebe.*[50] In *Southworth,* several students at the University of Wisconsin-Madison objected to having a portion of their mandatory activity fees subsidize eighteen named private organizations, which the students claimed engaged in political and ideological activities.[51] The court held that the University could not constitutionally force objecting students to fund private organizations that engage in political and ideological activities, speech, and advocacy.[52] The court, pursuant to the *Abood* and *Keller*

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supra notes 6 and 7. Second, the *Southworth* court decided that the issues on trial in *Rosenberger* were not the same as those here. Southworth v. Grebe, 151 F.3d 717, 722 & n.3 (7th Cir. 1998). The court stated that *Rosenberger* was an issue of disbursement within an established forum, while this was a case of compelling students to fund ideological and political organizations. *Southworth,* 151 F.3d at 733 & n.3.

Moreover, even if a forum analysis was applicable to some degree, several circuit courts of appeal concluded that achieving content neutrality would not adequately protect the rights of students not wanting to subsidize political speech. Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985) (*Galda II*). The court in *Galda II* stated that "if the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded." *Galda,* 772 F.2d at 1067. *See Carroll I,* 957 F.2d at 998 (stating that compelling speech through groups other than one being challenged meant students must fund more than one unwanted view and thus, did not remedy constitutional infringements).

[50] 151 F.3d 717 (7th Cir. 1998).

[51] *Southworth,* 151 F.3d at 718-20. The court agreed that all 18 organizations participate in political and ideological activities, advocacy, and speech. *Id.* at 720. Each student had to pay $165.75 per semester in the 1995-96 academic year. *Id.* at 719. The fees generated rather large coffers for certain groups, e.g. the Wisconsin Student Public Interest Group (WISPIRG) received $49,500 from student fees in the 1995-96 academic year and the Campus Women's Center received $34,200 in the same interval. *Id.* at 720-21.

[52] *Id.* at 735. Several other defenses were raised by the University, but none altered the court's holding. First, the court concluded that since subsidization could be enabled either directly or indirectly the school could not earmark objecting students' funds for other areas and then continue funding the challenged organizations at the same level. *Id.* at 731-32. Next, the University argued that the case was distinguishable from *Abood* and *Keller* in that here objecting students could avail themselves of the democratic process; however, the court concluded First Amendment protections prevailed over such a speculative remedy. *Id.* at 732. Also, the court held that a refund system would inadequately protect the objecting students' constitutional rights since it permits an involuntary loan for purposes the students find objectionable. *Id.* at 733 (citing Ellis v. Brotherhood of Ry, Airline & S.S. Clerks, 466 U.S. 435, 443-45 (1984)).

analysis, as clarified by *Lehnert*, found that (1) the compelled funding was not germane to the University's educational purpose,[53] (2) that the asserted vital policy interests in education and allowing the students to participate in University governance did not justify compelled association,[54] and (3) that the arrangement significantly added to the burden on free speech inherent in the compelled association.[55]

(4) The Ninth Circuit

The most recent circuit court of appeal decision on this matter is *Rounds v. Oregon State Board of Higher Education*.[56] Several University of Oregon Students claimed their constitutional rights were violated when portions of their student fees were given to fund the Oregon Student Public Interest Research Group Education Fund (OSPIRG EF).[57] Distinguishing this case from other similar decisions,[58] the court held that the distribution of portions of mandatory fees to OSPIRG EF did not violate the Constitution.[59] The court concluded that "OSPIRG EF's activities were germane to the purpose for which the mandatory exaction was imposed as a matter of law."[60]

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[53] *Southworth*, 151 F.3d at 724. Relying on *Keller* and *Lehnert*, the court adopted a narrow interpretation of germaneness and found that any educational benefits derived from these groups was secondary to their stated political and ideological objectives. *Id.* at 726-27.

[54] *Id.* at 727. The court did acknowledge the vitality of the proffered interests. *Id.* However, the court concluded that no common cause bound the organizations and the objecting students. *Id.* at 727-28. *See supra* note 12.

[55] *Southworth*, 151 F.3d at 729. The court found that, in addition to the burden of compelled association, objecting students' speech was significantly burdened because of the degree of disagreement between the students and the challenged organizations, the public endeavors by the groups, and their desire to achieve public adherence to their points of view. *Id.* In response to concerns that removal of funding would remove controversial speech as a necessary component of education, the court agreed that controversial speech had its place but concluded that "the Constitution does not mandate that citizens pay for it." *Id.* (citing Regan v. Taxation with Representation, 461 U.S. 540 (1983)).

[56] 166 F.3d 1032 (9th Cir. 1999).

[57] *Rounds*, 166 F.3d at 1034.

[58] First, in a very strict interpretation of the notion of compelled association, the court held this was not such a case, despite the forced contributions, since the objecting students were not automatically members of OSPIRG EF. *Id.* at 1037. The court also held this was not truly a case of compelled speech since no student had to openly profess belief in any message, as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), and no student had to serve as a courier for an ideological message as in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). *Rounds*, 166 F.3d at 1037-38. Next, the court held that the orga-

2. *Supreme Court of California*

In *Smith v. Regents of the University of California*,[61] the California Supreme Court decided whether objecting students could constitutionally be compelled to subsidize, by way of mandatory activity fees, fourteen organizations that engage in political and ideological speech.[62] The court held that the University could not use objecting students' fees to fund political or ideological groups.[63] Relying on the *Abood* analysis, the court reasoned that at some point, a group's political activities will render its educational function secondary and, at such a point, educational interests will no longer justify the burdens

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nization here differed from the union in *Abood* in that OSPIRG EF allowed for open ideas and the exchange of information. *Id.* at 1038. Finally, the court concluded that OSPIRG EF was different from OSPIRG in that OSPIRG EF did not engage in lobbying efforts or other overt political action; thus, the political and educational functions were effectively separated and only the educational body was at issue here. *Id.*

[59] *Id.* at 1039-40. The court reserved judgment for instances where the challenged organization did engage in overt political and ideological activities. *Id.* at 1040 n.5.

[60] *Id.* at 1039. The court found OSPIRG EF's activities to be consistent with the governmental interest of education. *Id.*

[61] 844 P.2d 500 (Cal. 1993).

[62] *Smith*, 844 P.2d at 503-05. Students at the University of California at Berkeley were required to pay a mandatory student fee, portions of which went to political and ideological student groups on campus. *Id.* at 504. In 1982, when the case was first tried, the fee was $12.50 per student per quarter, but the total of such fees in the 1981-82 academic year was over $600,000. *Id.* The court stated that two important principles were placed in direct conflict in this case: (1) the principle that the government may not compel individuals to support political or ideological speech or activities financially versus (2) the notion that the Board of Regents must have abundant discretion to achieve its educational goals. *Id.* at 506.

[63] *Id.* at 511-13. The court adopted a narrow view of "germaneness," stating that a broader view would allow for greater burdens upon speech than could be justified by the state's interest in education. *Id.* at 508.

on the objecting students' rights.[64]

3. *Reconciling the Decisions*

The first step in analyzing this issue is to decide whether the above opinions can be reconciled. For *Kania* and *Supple*, cases challenging subsidization of student newspapers with mandatory fees, the courts found that newspapers were germane to the government's interest in education.[65] Moreover, the newspapers being challenged in these two cases did not present, at least to the same degree, the political and ideological concerns present in certain private organizations.[66]

In *Galda*, which involved a mandatory yet refundable fee earmarked for one specific group, the court relied upon findings that the group's activity was not germane to an educational purpose and a lack of any compelling interest to justify constitutional infringements.[67] The courts in *Southworth* and *Smith* extended those principles to a general fee that funded several private organizations.[68] The *Carroll* court, however, found that educational interests were furthered by the activities of a similar group and, consequently, found sufficient justification for the burdens on free speech that result from the mandatory contributions.[69] Nevertheless, certain limits were imposed to ensure the interests justified the burdens.[70]

The *Rounds* court found no constitutional violations due to the nature of the group involved. The group focused on educational concerns and avoided the ideological pursuits that were typical of many private organizations on campus.[71]

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[64] *Id.* at 511-12. The court directed the Board of Regents to determine which groups could permissibly be funded under the standards governing its holding and then devise a deduction or refund system to reimburse students objecting to forced subsidization of the challenged groups. *Id.* at 513-14. The court held that the administrative burdens of implementing such a remedy were not great enough to justify the constitutional infringements occurring in the system as challenged. *Id.* at 514. The court acknowledged that the University could avoid this burden by refusing to use mandatory student fees to fund political groups. *Id.*

[65] *See supra* notes 31, 32, 35, 36, and accompanying text.

[66] *See supra* notes 29, 34, and accompanying text.

[67] *See supra* notes 37, 39, 40, and accompanying text.

[68] *See supra* notes 52-55, 63, 64, and accompanying text.

[69] *See supra* notes 44-46 and accompanying text.

[70] *See supra* notes 47, 48, and accompanying text.

From this synthesis of the cases, one can see that none of the lower courts declared that mandatory fees can subsidize political or ideological groups without limitation.[72] We can also see that the only real, as opposed to hypothetical, conflict in the lower courts is that seen in the holdings of *Galda*, *Southworth*, and *Smith* on the one hand versus *Carroll* on the other. Thus, the ultimate issue is whether the educational benefits of private groups, whose primary focus is political and ideological in nature, will justify the burdens on free speech that arise in these compelled funding situations. With an eye to the Supreme Court's impending decision, it appeared important that the *Southworth* opinion was the only one to analogize heavily this issue to the Supreme Court's analysis in union dues and bar association fees cases,[73] and the opinion did not find the requisite justification.[74] The fact that the *Carroll* court found the necessary justification, but imposed certain limits to ensure those justifications, was also noteworthy.

Prior to the Supreme Court's decision, one final concern was whether the analysis outlined above was the appropriate standard to be invoked. The only other conceivable standard would be the *Rosenberger* analysis. The defense in *Southworth* argued for such an analysis to control,[75] thereby hoping the mandatory fee/student organization system would be deemed a limited public forum, which would permit ideological groups pursuant to the requirement of view-point neutrality. The circuit court in *Southworth* believed this was not a

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[71] *See supra* notes 58-60 and accompanying text.

[72] It appears as though several courts found any conceivable nuance or factual distinction to avoid having to address the constitutional issue presented in this comment. Among the lower courts, then, the practice of subsidizing political activities with mandatory fees was viewed as unconstitutional at worst and required severe limitations at best.

[73] *See supra* notes 53-55 and accompanying text.

[74] *See supra* note 54 and accompanying text.

[75] *See supra* note 49.

Rosenberger case,[76] and, at that time, that appeared to be the most logical conclusion.[77]

4. Problems with Remedies

Although a discussion of remedial measures is moot at this time, resolution of the issue necessarily involved some consideration of remedial measures, which have proven to be problematic, and such considerations may shed some light on the Supreme Court's decision. For instance, refund mechanisms may not remedy the constitutional concerns since this permits an involuntary loan and results in some burden, nonetheless.[78] Even if refunds were permissible, who decides what is political? And how and when do students object?[79] Also, if universities will be required to ensure the group expends as much on the campus as it took in from there, as in *Carroll*, the administration of that process could be quite difficult and may lead to further litigation.[80] These concerns over potential remedies do warrant discussion, but should they cause a court to conclude that the potential administrative burdens justify the existence of the challenged process?[81]

III. THE SUPREME COURT SPEAKS: THE *SOUTHWORTH* OPINION

A. The Majority Opinion

Based upon the foregoing analysis of lower court opinions the United States Supreme Court appeared to be headed for a straightforward public policy decision.[82] However, in *Board of Regents of the University of Wisconsin System v. Southworth*,[83] the Court's analysis was a hybrid of standards, combining portions of the compelled speech jurisprudence with elements of the public forum doctrine.[84] The Court stated as an initial proposition that the *Abood* and *Keller* analysis identifies the interests of objecting students only to conclude that such a standard was not applicable, and indeed would be unworkable, in the context of students' extracurricular speech at a university.[85] The Court—after concluding that the *Abood* and *Keller* analysis required some First Amendment protections for objecting students—held that the University of Wisconsin's program was constitutional so long as the allocation of funding was done in a viewpoint neutral manner.[86]

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[76] *See supra* note 49.

[77] The proper analysis seemed to be that *Rosenberger* governs disputes over activities within a limited public forum or over access to a limited public forum, and that the analysis developed in this comment governs compelled subsidization of political activities whether or not those activities occur within public fora.

[78] *See supra* notes 40 and 52.

[79] For a discussion of these and other issues relating to remedies and enforcement, see Ralph D. Mawdsley & Steven Permuth, *Mandatory Student Fees and Free Speech*, 132 ED. L. REP. 265, 272-74 (1999).

[80] *See supra* note 48.

[81] *See supra* note 64. In the opinion, the Supreme Court acknowledged that in the event contribution of fees was to be optional, or there was to be a refund system, the resulting disruption could be overwhelming. Board of Regents of the Univ. of Wisconsin Sys. v. Southworth, 120 S. Ct. 1346, 1356 (2000).

Aside from this broad holding two other aspects of the majority opinion warrant discussion. First, the Court discussed the structure of the University' student organization program, including requirements ostensibly focused on maintaining the educational nature of the groups as opposed to overtly political activities.[87] However, the relevancy of such factors in the overall analysis is unclear since the Court's holding apparently rests the determination exclusively on the viewpoint neutrality of fee allocation.[88] Also, the Court, relying solely on the University's own assertion, concluded that the state and its agents were not controlling the content of the speech here, in which case a different First Amendment analysis would govern.[89]

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[82] The policy decision would be whether the educational benefits derived from subsidization of political and ideological student groups with mandatory student activity fees justified the resulting infringements upon an objecting student's First Amendment right not to be compelled to support speech with which he or she does not agree. *See supra* Part II.B.3.

[83] 3120 S. Ct. 1346 (2000).

[84] *Southworth*, 120 S. Ct. at 1354-57. For a discussion of the forum doctrine, *see supra* notes 49, 75-77, and accompanying text.

[85] *Southworth*, 120 S. Ct. at 1354. The Court recognized that the educational purposes of a university necessarily require different viewpoints regarding endless subject matters and that it would not be practical to explore what is or is not germane to that educational purpose. *Id.* at 1355.

[86] *Id.* at 1350, 1354, and 1356. The parties stipulated that the program was maintained in a viewpoint neutral manner, and if that stipulation continued on remand then the program would have to be found consistent with the First Amendment. *Id.* at 1356. The Court did, however, question the constitutionality of the provision in the program that permitted for the termination of funding for certain groups by way of a student referendum. *Id.* at 1354.

[87] *Id.* at 1350-52. For instance, the University of Wisconsin required groups that were eligible for allocation of student fees to be non-profit, have membership

B. Critical Analysis

In this commentator's opinion, the Court correctly distinguished the nature of educational institutions from the groups seen in *Abood*, *Keller*, and *Lehnert*.[90] Indeed, germaneness is difficult to determine in light of the broad and diverse goals of a university. However, with all due respect to the Court, the hybrid standard will likely invite cases contesting the viewpoint neutrality of student fee allocation systems.[91] The Court could have avoided the uncertainty that is likely to result by holding either that politically oriented groups are germane to a university's purpose and that educational interests justify First Amendment burdens—a plausible holding in light of the diverse goals of a university—or that germaneness

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limited primarily to students, and undertake activities related to student life on campus. *Id.* at 1351-52.

[88] *Id.* at 1354. The Court did acknowledge that the student activity fund differed from traditional public forum cases, but did not discuss the analytical problems, if any, associated with such differences. *Id.*

[89] *Id.* at 1354, 1357. The Court recognized that a different case would be presented if tuition expenses were involved and the University and its officials were responsible for the content of the speech. *Id.* at 1354. With all due respect to the Court, this commentator questions the soundness of considering the students as the speakers when the University compels the contributions, particularly when the allocations are subject to the approval of the chancellor and board of regents. *Id.* at 1351-52.

[90] *See supra* notes 85 and accompanying text.

[91] The fact that the Court did not include the University of Wisconsin's specific requirements for student groups into its analysis may also invite lawsuits wherein certain program-specific matters can be distinguished. *See supra* notes 87, 88, and accompanying text. Moreover, this commentator agrees with the conclusion of several circuit courts of appeal in that requiring viewpoint neutrality does not remedy constitutional concerns and may in fact compound the problem of compelled speech. *See supra* note 49.

is too attenuated and educational interests do not justify First Amendment burdens—an equally plausible holding in light of a balancing of public policy interests.[92] Stated differently, this commentator considers the compelled speech analysis seen in *Abood* and *Keller* the most desirable analytical framework for a simple, predictable solution to the issue. Indeed, the uniqueness of the educational goals of a university does not require a different standard. Rather, it simply provides ample grounds to support either of the possible holdings under the compelled speech analysis.

C. Justice Souter's Concurring Opinion

Justice Souter, joined by Justice Stevens and Justice Brewer, wrote separately to concur in the majority opinion.[93] Justice Souter agreed with the majority view regarding the permissibility of the University of Wisconsin's scheme.[94] However, Justice Souter did not approve of the recognition of a new standard of viewpoint neutrality, as developed in the majority opinion, and would have held that the objecting students did not have sufficient First Amendment concerns to warrant protection under any standard other than the viewpoint neutrality already seen in the University's program.[95]

IV. PUBLIC POLICY ANALYSIS

Although the Supreme Court chose somewhat of a hybrid analysis combining compelled speech and public forum standards, this commentator concludes that the ultimate resolution of this issue will require the confrontation of a straightforward public policy question, pitting educational concerns against compelled speech issues. Consequently, a brief discussion of such an analysis is appropriate.

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[92] *See supra* Part II.B.3 and *infra* Part IV.

[93] *Southworth*, 120 S. Ct. at 1357.

[94] *Id.*

[95] *Id.* Justice Souter also discussed whether the objecting students had a claim to relief from the system, focusing on principles of academic freedom and government speech jurisprudence. *Id.* at 1358-61.

Even a socialist radical understood the importance of the government not compelling an individual to speak against his or her will.[96] The Court in *Barnette* stated that such a principle was as precious as any right protected by our system of law.[97]

Against this freedom we witness the proffered justification of public universities needing to provide the most diverse educational experience as possible.[98] Although the latter policy is indeed noble and perhaps necessary, it appears to be a weak justification in these cases. The challenged organizations are not being asked by the objecting students to leave campus; their rights to engage in ideological and political speech and advocacy are not at issue here. Indeed, the policy of a diverse education would be threatened only if these fees were the sole source of funds for these private organizations.[99] Even then, most universities offer classes and have organizations that meet the needs of a diverse education without unduly burdening constitutional rights.[100] Moreover, since many of these groups receive outside funds as well[101] it would be unwise to have a *total* infringement upon sacred constitutional rights to avoid a *partial* hindrance of the activities of these political organizations.

In light of this balancing of the competing policy interests, this comment respectfully disagrees with the Supreme Court's decision in *Southworth*.

V. CONCLUSION

The issue of whether public universities may constitutionally subsidize private organizations that engage in political and ideological activities with mandatory student fees involves a recent conflict between two enduring and basic American principles. The two conflicting policies in this arena are free speech and its corollaries versus the desirability of providing a broad and diverse educational experience. The Supreme Court recently upheld the practice, but avoided the ultimate policy issues involved. With all due respect to the Supreme Court, this commentator argues that public policy would best be served by holding that forced contributions to political and ideological groups do not significantly further universities' educational aims to the degree necessary to justify an infringement of our First Amendment rights.

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[96] *See supra* note * and accompanying text. *See also* Debs v. United States, 249 U.S. 211 (1919).

[97] *See supra* note 4.

[98] *See supra* note 44 and accompanying text.

[99] Several of these private groups have off-campus counterparts and receive funding from other sources. *See supra* note 43.

[100] *See supra* note 40.

[101] *See supra* note 48.

Walter James White

RECENT DECISION

TORTS—NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—FEAR OF AIDS CLAIM REQUIRES SHOWING OF ACTUAL EXPOSURE UNLESS DEFENDANT DESTROYS EVIDENCE OF EXPOSURE CREATING A REBUTTABLE PRESUMPTION AGAINST DEFENDANT

I. FACTS

On September 30, 1987, Jimmie N. Pickering was a patient in the South Central Regional Medical Center (South Central).[1] While obtaining services related to her diabetes, Pickering pricked her finger with a lancet provided by South Central.[2] Believing that other patients had used the lancet, Pickering claimed she suffered from a myriad of emotional disturbances caused by her fear of contracting HIV or other communicable diseases.[3]

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[1] South Cent. Reg'l Med. Ctr. v. Pickering, 749 So. 2d 95, 97 (Miss. 1999).

[2] *Pickering*, 749 So. 2d at 97. Pickering maintained that she requested that a nurse instruct her on how to test and regulate her blood sugar level. *Id.* The nurse then asked Pickering to show her the routine she normally followed and gave Pickering a testing kit. *Id.* When Pickering took a lancet from the kit and pricked her finger, the nurse immediately grabbed Pickering's finger in an attempt to prevent her from using the lancet. *Id.* The nurse discarded the lancet after informing Pickering that other patients had used the lancet. *Id.*

[3] *Id.* at 98. South Central conducted several HIV tests on Pickering over

On September 22, 1989, Pickering filed suit against South Central seeking damages for negligent infliction of emotional distress.[4] In denying South Central's Motion for Summary Judgment, the circuit court granted certification for interlocutory appeal.[5] The Mississippi Supreme Court granted South Central's Petition for Interlocutory Appeal and held: affirmed and remanded.[6] The court held that where a defendant destroyed the best evidence of actual exposure, a rebuttable presumption of exposure arose in favor of the plaintiff and allowed the plaintiff an opportunity to recover damages for the time between when the plaintiff learned of the possible exposure and received conclusive negative HIV test results.[7]

II. RELATED LAW

A. *Negligent Infliction of Emotional Distress in Mississippi*

The Mississippi Supreme Court examined whether a plaintiff must show proof of physical injury to recover damages for negligent infliction of emotional distress in *Sears, Roebuck & Co. v. Devers*.[8] In *Devers*, a plaintiff brought an action against a store to recover for negligence after the store mistakenly detained her for shoplifting.[9] Reversing a lower court

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the course of the following year, the results of which were negative. *Id.* Nevertheless, Pickering claimed she no longer socialized with friends, did not actively participate in her granddaughter's life, and did not go grocery shopping for fear she would infect those around her. *Id.*

[4] *Id.* at 96-97. Pickering offered no evidence that the lancets she used were contaminated with HIV or any other communicable diseases because South Central disposed of the lancets before testing them. *Id.*

[5] *Id.* The Circuit Court of the Second Judicial District of Jones County originally denied South Central's motion, but later amended its judgment to include the grant of certification for interlocutory appeal. *Id.* at 97.

[6] *Id.* at 103. The court noted the split among jurisdictions dealing with fear of AIDS cases. *Id.* at 99-101.

[7] *Id.* at 102. Because South Central disposed of the lancets Pickering could not provide evidence of actual exposure but could proceed in the suit with the rebuttable presumption that she was exposed to HIV. *Id.*

[8] 405 So. 2d 898 (Miss. 1981).

[9] *Devers*, 405 So. 2d at 899. Devers was with her daughter at the store. *Id.* When the alarm sounded as they left, the exit doors locked. *Id.* Store employees apologized to Devers after they discovered that the clerk did not remove the tag

judgment for the plaintiff, the court held that trial courts could "comfortably assess damages for mental and emotional distress" absent a physical injury when the defendant's conduct was particularly outrageous as long as the results were reasonably foreseeable.[10] The court also held that in a case of simple negligence, a cause of action existed when there was an assault upon the mind that was medically cognizable even without a physical injury.[11] The court reasoned that the nature of the negligent act rather than the seriousness of the consequences gave rise to legal redress.[12]

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off of a sweater when she sold it to Devers. *Id.* Although she did not receive medical treatment, Devers complained of anxiety associated with embarrassment. *Id.*

[10] *Id.* at 902. The reasonable foreseeability test establishes proximate cause or breach of a defendant's duty in negligent infliction of emotional distress claims. Mary Donovan, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 UCLA L. REV. 1337, 1376 (1994).

[11] *Devers*, 405 So. 2d at 902. The court maintained that plaintiffs must also meet the reasonable foreseeability test. *Id.* The court found there must be a subsequent physical or mental illness that required medical treatment. *Id. See* Greer v. Burkhardt, 58 F.3d 1070, 1073-74 (5th Cir. 1995) (disallowing recovery when plaintiff's proof only consisted of generalized testimony that plaintiff was "very upset"); Finkelberg v. Luckett, 608 So. 2d 1214, 1221-22 (Miss. 1992) (finding plaintiff's proof insufficient in negligence claim); Strickland v. Rossini, 589 So. 2d 1268, 1275-76 (Miss. 1991) (holding that testimony of plaintiff's depression was not demonstrative harm necessary to sustain negligence claim). *See also* Wirtz v. Switzer, 586 So. 2d 775, 784 (Miss. 1991) (finding that negligence claim can exist if non-physical injury required medical treatment).

The court recently reiterated its position in *Sears*, concerning the proof necessary to recover in negligent infliction of emotional distress cases. Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 741-43 (Miss. 1999). In *Strickland*, the court stated the rule once was that to recover damages for emotional distress the plaintiff had to prove "negligence accompanied by physical impact." *Strickland*, 589 So. 2d at 1275. In *Adams*, the court retreated from this historical position mentioned in *Strickland* stating, "[W]e have moved away from the requirement of proving some physical injury in addition to the proof of reasonable foreseeability." *Adams*, 744 So. 2d at 743.

[12] *Devers*, 405 So. 2d at 902. *See also* McFadden v. State, 580 So. 2d 1210, 1217 (Miss. 1991) (forbidding damages when plaintiff's conduct did not warrant legal redress).

B. Fear of Cancer in Mississippi

The Mississippi Supreme Court considered recovery for negligent infliction of emotional distress predicated on fear of future illness in *Leaf River Forest Products, Inc. v. Ferguson.*[13] In *Ferguson,* the circuit court entered judgment in favor of landowners who claimed negligent infliction of emotional distress for fear of contracting cancer because a paper mill polluted a nearby river with toxins.[14] Reversing the lower court judgment, the court held that in order to recover for emotional distress predicated on fear of future illness, plaintiffs must show "substantial proof of exposure and medical evidence that would indicate possible future illness."[15] The court reasoned that a legal cause of action existed only where a medically cognizable injury was present and not where there was only fear of future injury.[16]

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[13] 662 So. 2d 648 (Miss. 1995).

[14] *Ferguson,* 662 So. 2d at 651-57. The plaintiffs' property was located over 100 miles down river from the mill. *Id.* at 651. The plaintiffs did not test themselves or their property for the presence of dioxin but, instead, relied on tests of wildlife in the area of the Leaf River to support their claims. *Id.* at 653. The closest testing site to the plaintiffs' homes was 80 miles upriver from their property. *Id.*

[15] *Id.* at 658. The court found testimony at trial that the Fergusons had probably eaten fish containing levels of dioxin was insufficient to meet this standard of proof. *Id.* at 652-53, 659. The court noted that without substantial proof of exposure and medical evidence indicating possible future illness, plaintiffs must await a manifestation of the feared illness to have a valid claim for emotional distress. *Id.* at 658. *See* Owens-Illinois, Inc. v. Edwards, 573 So. 2d 704, 705-06 (Miss. 1990) (finding legitimate cause of action existed when illness manifested itself years after exposure). *See also* Bradley Peacock, *Torts—Infliction of Emotional Distress—Recovery for Fear of Future Illness Predicated on Proof of Exposure and Rational Fear,* 65 MISS. L.J. 763, 777 (1996) (noting that requiring proof of exposure served policy concerns of preventing excessive litigation and compensating plaintiffs with legitimate fears).

[16] *Ferguson,* 662 So. 2d at 658. The dissenting opinion attacked the majority opinion as contrary to Mississippi law. *Id.* at 665 (McRae, J., dissenting). The dissent stated that plaintiffs in Mississippi could recover absent proof of a physical manifestation when the conduct of the defendant involved intentional or grossly negligent acts likely to give rise to emotional distress. *Id.* (McRae, J., dissenting). *See* Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139, 148-49 (Miss. 1998) (requiring no physical manifestation when defendant's conduct was outrageous); Wong v. Stripling, 700 So. 2d 296, 307 (Miss. 1997) (refusing to

C. Actual Exposure as Majority View in a Fear of AIDS Case

The District Court of the Eastern District of Pennsylvania addressed the issue of whether a plaintiff may recover negligent infliction of emotional distress damages for fear of contracting Acquired Immune Deficiency Syndrome (AIDS) in *Burk v. Sage Products, Inc.*[17] In *Burk*, a paramedic brought suit for negligent infliction of emotional distress after a used needle protruding from its container stuck him.[18] The paramedic admitted he could not prove that the needle was contaminated but, instead, alleged that several AIDS patients were on that floor of the hospital at the time of the incident.[19] Granting summary judgment for the defendant, the court asserted that because the plaintiff could not demonstrate actual exposure to the AIDS virus his claim failed.[20]

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allow damages for emotional distress when plaintiff could not prove defendant engaged in outrageous conduct); Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1365-66 (Miss. 1995) (denying recovery to plaintiff for failing to prove outrageous conduct of defendant). *See also* Daniels v. Adkins Protective Serv., 247 So. 2d 710, 711 (Miss. 1971) (holding that plaintiff could recover absent showing of physical injury); Lyons v. Zale Jewelry Co., 150 So. 2d 154, 158 (Miss. 1963) (finding damages available to plaintiff without proof of physical harm); Saenger Theatres Corp. v. Herndon, 178 So. 86, 87 (Miss. 1938) (deciding plaintiff could recover for emotional distress after movie theater would not accept her ticket).

[17] 747 F. Supp. 285 (E.D. Pa. 1990).

[18] *Burk*, 747 F. Supp. at 286. The paramedic received five separate tests revealing that he had not contracted the AIDS virus. *Id.* Nonetheless, he claimed that he lived in fear of contracting the virus because of the negligence of the container manufacturer. *Id.*

[19] *Id.* HIV, the virus that attacks the immune system and eventually results in the AIDS virus, is spread through "vaginal, anal, or oral sexual contact, subcutaneous exposure to infected blood or blood components, sharing hypodermic needles, and during pregnancy or the birthing process." Ivan Yip, *AIDSphobia and the 'Window of Anxiety': Enlightened Reasoning or Concession to Irrational Fear?*, 60 BROOK L. REV. 461, 468 (1994). HIV is unique in that an infected person can remain asymptomatic for 10 years. *Id.* However, tests for HIV antibodies are at least 99% accurate when performed on blood samples of individuals infected for 12 weeks or more, and a second negative test after three to six months confirms no transmission of the disease. *Id.* at 470. Experts estimate that the combination of these two tests creates 99.9% accuracy in determining the presence of HIV in an individual. *Id.*

[20] *Burk*, 747 F. Supp. at 288. The court also stated that a claimant must show a physical injury resulting from exposure. *Id.* at 287. While the court found that the plaintiff had suffered the requisite physical injury (impotence) necessary

The court reasoned that, like other fear of future illness cases, the plaintiff must prove actual exposure to the feared illness to recover damages.[21]

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for the claim, the court held that the physical injury itself did not result from exposure to the feared illness, but instead resulted from fear of exposure. *Id.* at 287-88. The court ruled that "while injuries stemming from a fear of contracting illness after exposure to a disease-causing agent may present compensable damages, injuries stemming from fear of the initial exposure do not." *Id.* at 288. *See also* Wisniewski v. Johns-Mansville Corp., 759 F.2d 271, 274 (3rd Cir. 1985) (dismissing plaintiff's claim for failure to show injuries stemming from exposure itself).

Generally, actual exposure requires two factors: "First, there must be an exposure to tissue, blood, or body fluid infected with HIV, and second, the exposure to the infected tissue, blood, or body fluid must be by way of a channel of communication or transmission deemed medically or scientifically sufficient to cause an HIV infection." Hartwig v. Oregon Trail Eye Clinic, 580 N.W.2d 86, 91 (Neb. 1998). When both factors are capable of proof or disproof, the actual exposure rule operates as an objective test for the reasonableness of the plaintiff's fear of AIDS. *Hartwig*, 580 N.W.2d at 91. *See also* Majca v. Beekil, 701 N.E.2d 1084, 1090 (Ill. 1998) (stating that actual exposure requirement distinguishes claims based on conjecture from those based on genuine fear).

[21] *Burk*, 747 F. Supp. at 287. Many courts have applied the same rationale in fear of AIDS cases as in cancer phobia cases because of the similarity between the claims. Wendy Allison Reese, *Tort Law Actual Exposure or Possible Exposure?: The AIDS Phobia Debate—Are Courts Opening the Litigation Floodgates or Illustrating Judicial Proscription?*, 22 AM. J. TRIAL ADVOC. 495, 495-96 (1998). *But see* Jill Trachtenberg, *Living in Fear: Recovering Negligent Infliction of Emotional Distress Damages Based on the Fear of Contracting AIDS*, 2 DEPAUL J. HEALTH CARE L. 529, 547-48 (1999) (arguing that cancer and AIDS are not comparable).

Extending their actual exposure requirement in cancer phobia claims, the majority of jurisdictions that have considered claims for infliction of emotional distress based on fear of AIDS have determined that actual exposure to the virus is a necessary requirement for the claim. Matthew Warren Grill, *Recovery For Emotional Distress Due to Fear of AIDS: Exposing AIDSphobia in Alabama*, 49 ALA. L. REV. 1009, 1028 (1998). Courts have required actual exposure under two approaches with both reaching the same conclusion. Pendergist v. Pendergrass, 961 S.W.2d 919, 924 (Mo. Ct. App. 1998). First, some courts have expressly identified "actual exposure" as a required element of a fear of AIDS case without further comment. *See* Brzoska v. Olson, 668 A.2d 1355, 1363 (Del. 1995) (noting that allowing claim for fear of contracting AIDS without actual exposure would open Pandora's Box of "AIDS-phobia" claims); Neal v. Neal, 873 P.2d 871, 876 (Idaho 1994) (denying wife's claim against former husband for failure to allege actual exposure); K.A.C. v. Benson, 527 N.W.2d 553, 559 (Minn. 1995) (finding plaintiff was not in "zone of danger" because she was not actually exposed to AIDS virus). Other courts have held that, absent actual exposure, the fear of contracting AIDS is per se unreasonable. *See* Russaw v. Martin, 472 S.E.2d 508, 512 (Ga. Ct. App.

D. Reasonableness as Minority View in a Fear of AIDS Case

The Court of Appeals of Maryland considered recovery for emotional distress based on a fear of developing AIDS in *Faya v. Almaraz.*[22] In *Faya*, patients sued a physician for failing to reveal he was HIV positive before treating them.[23] Reversing the lower court dismissal of the suit, the court held that the patients could recover for the period between when they learned of the doctor's illness and the time they received conclusive HIV-negative test results.[24] The court reasoned that

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1996) (ruling that plaintiff's fear of contracting AIDS was unreasonable unless he could show actual exposure to virus); Vallery v. Southern Baptist Hosp., 630 So. 2d 861, 867 (La. Ct. App. 1993) (finding plaintiff's fear in absence of channel of transmission unreasonable); Drury v. Baptist Mem'l Hosp. Sys., 933 S.W.2d 668, 675 (Tex. Ct. App. 1996) (holding that, absent proof of actual exposure, fear of contracting HIV is unreasonable as matter of law).

In relying on actual exposure to determine the validity of fear of AIDS claims, courts profess to protect individuals infected with the AIDS virus from rampant misperceptions of the disease. Demilio v. Schrager, 662 A.2d 627, 636 (N.J. Super. Ct. Law Div. 1995) (stating policy concerns behind requiring actual exposure). *See also* James C. Maroulis, *Can HIV-Negative Plaintiffs Recover Emotional Distress Damages for Their Fear of AIDS?*, 62 FORD. L. REV. 225, 261 (1993) (contending that actual exposure makes plaintiffs' claims reasonable). These courts have noted that allowing juries to determine the reasonableness of the plaintiff's fear invites jury speculation and may allow recovery based on ignorance or unreasonable fear of the AIDS virus. *Id.* Courts have found that the actual exposure requirement may also protect the justice system from frivolous litigation, ensuring that only plaintiffs actually injured by defendant's negligence recover for their emotional distress. *Pendergist*, 961 S.W.2d at 926. *See also* Lauren J. Camillo, *Adding Fuel to the Fire: Realistic Fears or Unrealistic Damages in AIDS Phobia Suits?*, 35 S. TEX. L. REV. 331, 363 (1994) (claiming that many cases are filed based on subjective fear of AIDS rather than actual exposure to virus); Mandana Shahvari, *AFRAIDS: Fear of AIDS as a Cause of Action*, 67 TEMP. L. REV. 769, 771 (1994) (stating that courts use actual exposure as weapon against many claims based on irrational fear of AIDS).

[22] 620 A.2d 327 (Md. 1993).

[23] *Faya*, 620 A.2d at 329. Dr. Almaraz knew he carried the AIDS virus in 1986. *Id.* at 329. He performed surgery on the plaintiffs at the Johns Hopkins Hospital, where he had operative privileges in 1988 and 1989. *Id.* The plaintiffs learned of Almaraz's condition in 1990 shortly before Almaraz died of AIDS later that year. *Id.* Both plaintiffs tested negative for HIV infection immediately after learning of Almaraz's condition and brought suit against him and the hospital that same year. *Id.*

[24] *Id.* at 336-37. Courts refer to this period of recovery as the "window of anxiety." *Id.* at 337. The window of anxiety recognizes that while a plaintiff's fear

the patients' fear of acquiring AIDS was reasonable even though they did not show an actual exposure to the AIDS virus.[25]

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of contracting a virus may be reasonable, it becomes unreasonable when it becomes medically certain that the plaintiff did not contract the illness. *Id. See* Michele L. Daley, Barrett v. Danbury Hospital—*The Connecticut Courts Take Their First Look at a Claim for Negligent Infliction of Emotional Distress in an "AIDS Phobia" Case,* 17 QUINNIPIAC L. REV. 261, 277-78 (1997) (discussing purpose of window of anxiety in *Faya*). *See also Hartwig*, 580 N.W.2d at 91-95 (finding that damages were available in fear of developing AIDS case for window of anxiety). *But see* Tischler v. Dimenna 609 N.Y.S.2d 1002, 1009-10 (N.Y. Sup. Ct. 1994) (creating objective window of anxiety by measuring it from discovery of exposure, or when plaintiff should have discovered exposure, to viability of test procedure).

[25] *Faya*, 620 A.2d at 336. The court noted that the requirement that plaintiffs allege an actual channel of transmission would unfairly punish them for lacking the requisite information to do so. *Id.* at 337. Some commentators have suggested that the plaintiffs' fears were unreasonable because the scientific community regards the risk of transmission of HIV from a physician to a patient as "infintesimal." Mary K. Logan, *Who's Afraid of Whom? Courts Require HIV-Infected Doctors To Obtain Informed Consent of Patients,* 44 DEPAUL L. REV. 483, 492-94 (1995). The *Faya* court found that the gravity of the harm (death) transformed the theoretical possibility of transmission into a material risk. *Faya*, 620 A.2d at 334. *See also* Doe v. Washington Univ., 780 F. Supp. 628, 633-34 (E.D. Mo. 1991) (upholding dental school's decision not to allow HIV-infected student to finish his required curriculum because of fear of transmission to patients). The *Faya* court held that the physician owed a duty to the plaintiff to first warn of his HIV positive status or to refrain from performing surgery. *Faya*, 620 A.2d at 333.

A minority of jurisdictions have agreed with the *Faya* court. *See* Marchica v. Long Island R.R. Co., 31 F.3d 1197, 1204-06 (2d Cir. 1993) (using reasonableness test to allow plaintiff to recover in fear of AIDS case); Barrett v. Danbury Hosp., 654 A.2d 748, 757 (Conn. 1995) (requiring plaintiffs to meet reasonableness standard); Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 188-90 (Ind. Ct. App. 1998) (finding evidence supported reasonableness of plaintiff's fear). *See also* Bordelon v. St. Frances Cabrini Hosp., 640 So. 2d 476, 479 (La. Ct. App. 1994) (ruling that person could develop reasonable fear of contracting AIDS without actual exposure); Madrid v. Lincoln County Med. Ctr., 923 P.2d 1154, 1162 (N.M. 1996) (rejecting actual exposure test and embracing reasonableness test). However, the reasonableness requirement is criticized for placing AIDS phobia recovery on uncertain ground so as to diminish judicial integrity. Robert C. Bollinger, *On the Road to Recovery for Emotional Harm, Is the Fear of AIDS a Legally Compensable Injury?*, 16 J. LEGAL MED. 417, 440 (1995). One comementator suggests that the reasonableness standard creates excessive litigation because the standard is so subjective and it ignores the potential adversities that accompany speculative damage awards. *Id.*

E. Alternative Approach to Actual Exposure and Reasonableness

The Illinois Appellate Court established an alternative approach to fear of AIDS cases in *Doe v. Northwestern University*.[26] In *Northwestern*, patients brought suit after discovering that an HIV positive dental student performed treatment on them.[27] Affirming a lower court dismissal, the court found that the plaintiffs could not recover because they could not show a particularly substantial risk of HIV infection.[28] In distinguishing its holding from an actual exposure requirement, the court reasoned that plaintiffs should recover for the time they reasonably feared a substantial, medically verifiable possibility of contracting the disease.[29]

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[26] 682 N.E.2d 145 (Ill. App. Ct. 1997).

[27] *Northwestern*, 682 N.E.2d at 147. The plaintiffs received treatment from several students in Northwestern's dental clinic. *Id.* The plaintiffs brought suit after Northwestern sent them a letter informing them that a dental student was HIV positive. *Id.* The plaintiffs' attorney later determined the identity of the HIV-infected student and ascertained when that student treated each plaintiff. *Id.*

[28] *Id.* at 153. The court found that the plaintiffs only showed that they faced an extremely remote possibility of contracting AIDS. *Id.* at 152. The court maintained that a reasonable, compensable fear did not include fear due to ignorance concerning AIDS and its transmission. *Id.* The court further asserted that while anyone stuck with a used needle could reasonably fear contracting AIDS, this reasonable fear was not compensable unless the plaintiff faced a particularly substantial risk of HIV infection. *Id.* The court found that a particularly substantial risk of HIV infection existed "when the plaintiff learns that the used needle probably held bodily fluids of a person who had HIV." *Id.*

[29] *Id.* at 152. The court held that this requirement was distinguishable from the actual exposure requirement because plaintiffs who prove actual exposure cannot recover if they do not present sufficient evidence that they feared a substantial, medically verifiable possibility of contracting AIDS. *Id.* at 153. The court found that a plaintiff should not recover damages for actual exposure without evidence that the plaintiff knew of facts showing a substantial possibility of contracting the disease. *Id. See* Bollinger, *supra* note 25, at 440-41 (endorsing two-prong requirement of exposure along with medically verifiable risk of contracting AIDS). Also, the court found that this verifiable possibility test addressed the degree to which plaintiffs based their fears of AIDS transmission on misconceptions better than the actual exposure test adopted by a majority of jurisdictions. *Northwestern*, 682 N.E.2d at 152. *But see* Eric S. Fisher, *AIDSphobia: A National Survey of Emotional Distress Claims for the Fear of Contracting AIDS*, 33 TORT & INS. L.J. 169, 197 (1997) (claiming this new standard may increase number of claims because plaintiffs who are unable to show actual exposure can offer expert

III. *SOUTH CENTRAL REGIONAL MEDICAL CENTER V. PICKERING*

In *South Central Regional Medical Center v. Pickering*,[30] the Mississippi Supreme Court addressed the issue of whether plaintiffs could recover for negligent infliction of emotional distress predicated on a fear of AIDS without proof of actual exposure.[31] The court acknowledged that, under Mississippi law, plaintiffs must show actual exposure to the feared illness in order to recover.[32] However, where a plaintiff could not present the best evidence of actual exposure to an illness because of the defendant's actions, a rebuttable presumption of exposure arose in the plaintiff's favor, which allowed the plaintiff the opportunity to recover damages for the time between the alleged exposure and the receipt of conclusive test results establishing no disease transmission.[33] In affirming

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testimony that possibility of contracting AIDS was "medically verifiable").

The Supreme Court of Illinois later reviewed the appellate court decision in *Northwestern*. Majca v. Beekil, 701 N.E.2d 1084, 1085 (Ill. 1998). While the court affirmed the lower court dismissal, they did so because the plaintiffs failed to allege actual exposure to the disease. *Majca*, 701 N.E.2d at 1091. The court held that plaintiffs need not show a likelihood of developing AIDS in order to state a claim for emotional distress. *Id.*

[30] 749 So. 2d at 95 (Miss. 1999).

[31] *Pickering*, 749 So. 2d at 102. In reviewing relevant case law regarding fear of AIDS cases, the court noted the different approaches various jurisdictions used in reaching a conclusion regarding the necessary elements of a claim. *Id.* at 99-101.

[32] *Id.* at 98. The court relied on past treatment of emotional distress in fear of cancer cases to require actual exposure. *Id.* The court found that in actual exposure cases, plaintiffs must establish that defendant owed plaintiff a duty of protection from the disease, that defendant breached that duty, that the resulting emotional distress was a foreseeable result of that breach, and that there was emotional distress. *Id.* at 102.

[33] *Id.* The court noted that this presumption arose only where defendant had notice that a material, factual issue existed regarding that evidence. *Id.* Where the defendant did not know or have reason to know that such an issue existed regarding the discarded evidence, and disposed of the evidence during the course of "usual medical practice," a rebuttable presumption did not arise. *Id.* The court declared that whether the defendant had notice was a question of fact for the fact finder. *Id.*

The court also held that if the plaintiff failed or refused to get tested for HIV antibodies, no presumption arose and, therefore, no cause of action existed.

the lower court's decision, the court asserted that because the plaintiff could not test evidence of exposure the defendant should bear the burden of proving that the object with which the plaintiff came into contact as a result of the defendant's negligence did not carry a disease causing agent.[34] The court insisted that it was not overruling the actual exposure requirement in negligent infliction of emotional distress cases based on fear of future illness but, instead, was offering a way for the plaintiff to recover damages when the defendant prevents the plaintiff from presenting evidence of actual exposure, thereby impeding a key element of the case.[35]

IV. DISCUSSION

In *South Central Regional Medical Center v. Pickering*, the Mississippi Supreme Court maintained its requirement of actual exposure in negligent infliction of emotional distress claims based on fear of future illness and joined the majority of jurisdictions in requiring proof of actual exposure to the AIDS virus.[36] The court's decision affirms the use of the actu-

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Id. at 103. Since Pickering obtained reliable HIV negative test results this caveat did not apply to the present case. *Id.*

[34] *Id.* at 102. By affording this presumption to the plaintiff, the court claimed that it would prevent the unjust result of punishing a plaintiff for not offering proof of exposure where the defendant destroyed the source of proof. *Id.* The court found that this holding would encourage health care providers to use reasonable care in handling instruments capable of transmitting disease and to conduct tests on those instruments if they negligently come into contact with a person. *Id.* The court found that by taking these steps, health care providers could quell potentially recoverable fears victims might have of contracting HIV or other communicable diseases. *Id.*

[35] *Id.* The court found that, unlike earlier case law dealing with the actual exposure requirement, the plaintiff did not have the opportunity to offer evidence of actual exposure. *Id.* Because South Central chose not to have the lancet tested, even though it was aware that a question existed regarding its sterility, the rebuttable presumption of exposure arose against them. *Id.*

[36] *See supra* notes 7, 15, 20-21, 32, and accompanying text. The court makes clear that future claims unaccompanied by a showing of actual exposure are unreasonable as a matter of law if the rebuttable presumption does not arise, while retreating from its earlier requirement of medical evidence indicating possible future illness in fear of cancer cases. *See supra* notes 15, 21, 32-33, and accompanying text. Other actual exposure jurisdictions may look to *Pickering's* rebuttable

al exposure requirement as an objective test to measure the validity of the claimed emotional distress and establishes a window of anxiety wherein plaintiffs with legitimate claims may recover damages.[37] In carving out an exception for the plaintiff by establishing a rebuttable presumption when the defendant destroys evidence of actual exposure, the court certified that future defendants will not go unpunished for destroying evidence when a factual issue exists regarding its sterility.[38]

While *Pickering* endorses the policy concerns behind requiring actual exposure, it does not expressly refute policy reasons for liberalizing evidentiary standards in fear of AIDS cases.[39] Furthermore, although the court found that this plaintiff should receive the rebuttable presumption of exposure, its decision leaves some ambiguities as to exactly when a defendant's actions create this presumption.[40] The court

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presumption approach rather than adopt an entirely new standard of proof when the defendant destroys evidence. *See supra* notes 7, 21, 25, 33, and accompanying text.

[37] *See supra* notes 15, 21, 33-34, and accompanying text. However, the court did not create an objective window of anxiety, thereby generating the possibility of recovery far beyond the viability of test procedures. *See supra* notes 19, 24, 33-34, and accompanying text. Future litigants may argue over what damages are available to a plaintiff who does not discover the potential exposure incident until well after the viability of HIV test procedures. *See supra* notes 19, 24, 33-34, and accompanying text. Also, the court did not clearly define "actual exposure," leaving future litigants in doubt regarding the validity of their claim. *See supra* notes 15, 20-21, 32, and accompanying text.

[38] *See supra* notes 20, 25, 35, and accompanying text. The court assured future plaintiffs that defendants have a duty to retain and, when possible, test the mechanism of exposure when a material, factual issue exists regarding its sterility. *See supra* notes 25, 34-35, and accompanying text. However, the court only applied the rebuttable presumption because the defendant destroyed the best evidence of exposure, leaving future litigants to argue about the value of the destroyed evidence. *See supra* note 33 and accompanying text.

[39] *See supra* notes 20-21, 25, 29, 34, and accompanying text. All of the policy concerns addressed by the court involve health care providers. *See supra* note 34 and accompanying text. By not discussing other policy concerns its decision serves, the court left undetermined how it will apply its decision to future claims made outside the health care setting. *See supra* notes 20-21, 25, 29, 34, and accompanying text. Also, while encouraging health care providers to test instruments immediately after exposure, the court did nothing to prevent the claims themselves. *See supra* notes 25, 34, and accompanying text.

[40] *See supra* notes 33-35 and accompanying text. The court did not establish

failed to establish a standard for future litigants for when the defendant should be on notice that the evidence in his or her possession is germane to future litigation.[41] The *Pickering* decision indicates that whether the rebuttable presumption arises in the future is dependant on the particular facts of each case and that future plaintiffs must make every effort to show actual exposure to the feared illness to establish a viable claim.[42]

V. CONCLUSION

The *Pickering* decision resolves whether plaintiffs must always prove actual exposure in claims of negligent infliction of emotional distress based on fear of future illness. The ruling preserves Mississippi's actual exposure requirement while creating a caveat preventing defendants from destroying evidence, and thereby evading a recoverable claim. While the court did not precisely define when the exception to the actual exposure rule should apply, *Pickering* offers a standard for the validity of future claims.

Trey Watkins

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precedent for when evidence of actual exposure is destroyed through no fault of the plaintiff or defendant. *See supra* notes 25, 33-35, and accompanying text.

[41] *See supra* notes 33-35 and accompanying text. The issue of whether the defendant had notice that a fact question existed regarding the source of contamination may cause confusion for future litigants. *See supra* note 33 and accompanying text. Future litigants may end up trying two cases: one concerning whether the defendant had notice (and defining notice) and a second regarding the emotional distress claim. *See supra* note 33 and accompanying text.

[42] *See supra* notes 15, 20-21, 35, and accompanying text. Future plaintiffs without evidence of actual exposure and without a claim that the defendant destroyed the evidence of actual exposure will not have a negligent infliction of emotional distress claim based on their fear of AIDS. *See supra* notes 25, 33-35, and accompanying text.

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